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ALPHABETICAL LIST OF CASES.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 892.

CHARLES B. SHAFFER, - - - - - - *Appellant,*

vs.

E. B. HOWARD, Auditor of the State of Oklahoma, and JOHN S. WOOFTER, Sheriff of Creek County, State of Oklahoma, - - - - - - - *Appellees.*

(26359)

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF OKLAHOMA.

BRIEF.

This is an appeal from an order denying an interlocutory injunction applied for under the provisions of Section 266 of the Judicial Code.

Statement.

This is an action brought by the appellant Charles B. Shaffer, a citizen of the State of Illinois, residing in the City of Chicago, to enjoin the collec-

tion by the Auditor of the State of Oklahoma and the Sheriff of Creek County, in the State of Oklahoma, of an income tax received by him from business carried on, and property owned by him in Oklahoma.

A temporary restraining order was granted by the United States District Judge for the Eastern District of Oklahoma. The case then came on to be heard before Honorable KIMBROUGH STONE, United States Circuit Judge; Honorable JOHN H. COTTERAL and Honorable RALPH E. CAMPBELL, United States District Judges, upon the application for a temporary injunction. The application was heard October 31st, 1917, and taken under advisement. On the 7th of February, 1918, Judge STONE filed an opinion holding that the injunction should be denied. Judge COTTERAL filed a concurring opinion, and Judge CAMPBELL filed a dissenting opinion. A decree was entered refusing the injunction and Shaffer has taken this direct appeal to this court. The temporary restraining order was continued in force during the pendency of the appeal. Though the record does not show it, the order continuing the temporary injunction in force was made with the consent of all the Judges and was not opposed by the Attorney General of Oklahoma. The application was heard on the Amended Bill of Complaint, the Answer of defendants, and an affidavit of plaintiff. The Amended Bill of Complaint is as follows:

Amended Bill of Complaint.

The plaintiff, Charles B. Shaffer, complains of the defendants, E. B. Howard, State Auditor, and John S. Woofter, Sheriff, and alleges:

That he, the said plaintiff, is a citizen and resident of the State of Illinois and that he is not now and never has been a resident of the State of Oklahoma; that the defendant, E. B. Howard, is the duly elected and qualified State Auditor of the State of Oklahoma and, as such, is charged with the duty of collecting income taxes due the said state under the terms and provisions of Chapter 164 of the Session Laws of Oklahoma of 1915, and that the defendant, John S. Woofter, is the duly elected and qualified Sheriff of Creek County, State of Oklahoma, and as such, is authorized and empowered to levy tax warrants and to collect delinquent taxes of all sorts, including income taxes provided for under Chapter 164 of the Session Laws of Oklahoma of 1915.

Plaintiff alleges that he is now and for several years has been engaged in the oil business in the State of Oklahoma and that as such he has purchased, owned, developed and operated a number of oil and gas mining leases in said state, and that he is the owner in fee simple of a small amount of land in said state from which he produces oil; that a very small proportion of the oil produced by him in said state is produced from land to which he holds title.

Plaintiff alleges that he was engaged in such business during the year 1915 and that from properties owned and operated by him in the State of Oklahoma during the year 1916, he received a net income of One Million Five Hundred Sixty-two Thousand Six Hundred Forty-seven and 96/100 ($1,562,647.96) Dollars, which was produced largely from flush production from leases in the Cushing field, and which is greatly in excess of the income he will receive hereafter from the same property.

He alleges that Section 1 of Chapter 164 of the Session Laws of Oklahoma of 1915 (Act of the Legislature of the State of Oklahoma, approved March 17th, 1915) is as follows:

> "Each and every person in this state shall be liable to an annual tax upon the entire net income of such person arising or accruing from all sources during the preceding calendar year and a like tax shall be levied, assessed, collected and paid annually upon the entire net income from all property owned, and of every business, trade or profession carried on in this state by persons residing elsewhere."

Plaintiff alleges that Section 2 of said Chapter 164 requires a return to be made by each person liable under the provisions of the Act to the State Auditor on or before the 1st day of March of each year; and that Section 3 of said Chapter 164 provides a penalty for failure to make said return.

He alleges that said Auditor extended the time for filing reports under said Act, for the year 1916 for thirty days from the 1st day of March, 1917, and plaintiff alleges that on the 24th day of March, 1917, he made a return of his income which showed that at the rate fixed by said Chapter 164 of the Session Laws of Oklahoma of 1915, there was due the State of Oklahoma the sum of Seventy-six Thousand Sixty-seven and 40/100 Dollars ($76,067.40). He alleges that he made said return under protest and attached to said return a protest as follows:

PROTEST.

"The return to which this is attached is made under protest and is not to be taken as an admission by me that I owe to the State of Oklahoma any income taxes whatever, on property belonging to me situate in said state. I specifically deny all liability to the State of Oklahoma for any income taxes whatever for the reasons given herein and any other reasons that I may hereafter be advised of:

First. Because my income is intangible personal property and has no existence within the State of Oklahoma and is not situated either actually or legally in said state but only exists in the state of my residence, and because the State of Oklahoma has no extra territorial jurisdiction and cannot tax property not situated or existing within said state;

Second. Because if the income tax attempted to be levied on income paid to non-residents

from property within the State of Oklahoma is to be considered as a property tax, then the payment of the taxes on the gross production of oil and gas as provided in Chapter 39 of the Session Laws of 1916, relieves me from the payment of the taxes for the reason that my income from property in the State of Oklahoma is derived from oil and gas producing properties; and,

Third. Without waiving the grounds set forth under paragraphs one and two above, but insisting that they are both correct grounds upon which I can be excused from the payment of this tax, I contend that even though the first and second reasons above set forth should be decided against me, the tax upon my property would still be illegal and uncollectable because the income from property in the State of Oklahoma depends upon the management of the property and my personal attention. I do not reside in the State of Oklahoma and I give my personal attention to the business in Oklahoma from my place of residence by the use of the mails and telegraphs with an occasional trip to Oklahoma. The sales of oil and gas and the purchasing of equipment and supplies for the conduct of the business in Oklahoma is managed from my office in Chicago and my books are kept there. A portion of the products of my property in Oklahoma is sold out of the state and the Act of the Oklahoma Legislature under which this tax is collected provides no method or means by which the portion of the income arising from the skill and judgment with which the property is managed, and that derived from the

property as such, without reference to the management, can be divided, and provides no method for division of profits on products produced in Oklahoma, but sold out of the state.

In stating these reasons why I cannot be required to pay this tax, I do not mean or intend to waive other grounds upon which the tax is illegal. The reasons given above occur to me at this time, but there are probably other reasons also. I reserve the right to make any defense to the collection of this tax or to claim any ground to recover same, if paid, that I may be entitled to in law or equity, whether stated herein or not."

Plaintiff alleges that the said defendant, E. B. Howard, State Auditor, disregarded said protest and assessed an income tax against him of Seventy-six Thousand and Sixty-seven and 40/100 ($76,067.40) Dollars. Plaintiff alleges that Section 9 of Chapter 164 of the Session Laws of Oklahoma of 1915 with reference to income tax is as follows:

"The State Auditor is authorized to revise any returns that may be made to him, and he shall notify the party making such return of such revision on or before the first Monday in May following, and the Auditor shall hear and determine all complaints arising from such revision which are made before the first Monday in June following thereafter, and he shall have the same power to correct and adjust such assessment of income as is now given by law to the County Board of Equalization in cases of

> assessments of property ad valorem and the remedy, and proceedings before the said Auditor, shall be the same as those provided for reviewing assessments of property ad valorem by the County Board of Equalization."

That the defendant, E. B. Howard, State Auditor, did not offer to revise or take any steps towards revising said return and that this plaintiff requested the said defendant to grant a hearing upon the matters set forth in the protest and other questions to be raised. That the said defendant granted a hearing and heard testimony on the 1st day of August, 1917, and that after hearing the evidence the said Auditor decided that he was without authority to pass on the legal questions raised and that he then and there overruled the protest and all legal questions raised and ordered a tax warrant issued. Plaintiff alleges that he did not pay said sum on the 1st day of July, 1917, as provided by Chapter 164 of the Session Laws of Oklahoma of 1915, and that he has not yet paid said sum or any part thereof, and alleges that on the .... day of August, 1917, the defendant, E. B. Howard, issued a tax warrant against him and delivered same to the defendant, John S. Woofter, Sheriff of Creek County, Oklahoma, with instructions to levy upon and sell the property of this plaintiff in order to collect said sum of Seventy-six Thousand Sixty-seven and 40/100 ($76,067.40) Dollars, with penalties thereto attached

for failure to pay on the 1st day of July, 1917, and plaintiff alleges that the said defendant, John S. Woofter, is now threatening to levy said tax warrant upon the property of this plaintiff in Creek County, Oklahoma, and to sell the same for the collection of said tax warrant upon the property of this plaintiff in Creek County, Oklahoma, and to sell the same for the collection of said tax and penalties thereto attached, and that he will levy said tax warrant on the property of this plaintiff in Creek County, Oklahoma, and proceed to sell same within a short time, unless enjoined by this court.

Plaintiff alleges that Chapter 164 of the Session Laws of 1915 of the State of Oklahoma, hereinabove referred to insofar as it attempts and purports to subject the income of non-residents of the State of Oklahoma, to the payment of a tax, is unconstitutional, illegal and void and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States for the reason that it attempts to abridge the privileges and immunities of a citizen of the United States and attempts to take property of non-residents without due process of law and to deny non-residents of said state the equal protection of the law.

That said Chapter 164 so far as it attempts to tax the income of non-residents is unconstitutional, illegal and void and in violation of the Constitution

of the United States because it attempts to lay a burden upon interstate commerce. Plaintiff alleges that the income received by him from Oklahoma and upon which said return was made, is not derived merely from investments in Oklahoma, but is derived from an active business in which he not only has a large investment of money, but to which he devotes his time and business energy and judgment and that his income is produced from his business as such, and not simply from an investment in property in the State of Oklahoma. Plaintiff alleges that he manages his business from his office in the City of Chicago, in the State of Illinois; that all of his contracts are made and executed by him in said City of Chicago; that the books of his business are kept there, and that the sales of a considerable portion of the oil produced by him in the State of Oklahoma, are made to non-residents of the State of Oklahoma and delivered for immediate shipment outside of the State of Oklahoma and is interstate commerce, and that practically all of said oil is paid for outside of said state. He alleges that the net income produced from his property and business in Oklahoma is largely due to his management thereof and is dependent to a great extent upon his business judgment, ability and energy. He alleges that the State of Oklahoma is without jurisdiction, right or authority to tax his business skill and ability, and alleges

that the statute above quoted provides no method or means by which the portion of his income derived from his business management and judgment can be separated from the income produced upon the property alone without regard to its management.

Plaintiff alleges that said statute insofar as it attempts to tax his personal services, skill and ability is void because it is an attempt to tax something not within the State of Oklahoma and deprives him of his property without due process of law, in violation of the first section of the Fourteenth Amendment to the Constitution of the United States, and that said statute is void for indefiniteness because no method is provided in said statute for taxing his income from property separate and without regard to the management thereof.

Plaintiff alleges further that his income is intangible personal property which has its situs at his place of residence outside of the State of Oklahoma and that the State of Oklahoma has no jurisdiction to tax said income for the reason that the same is not within the jurisdiction of said state and that the tax so levied deprives the plaintiff of his property without due process of law.

Said plaintiff further alleges that said tax discriminates against non-residents in favor of residents, and that it discriminates against the plaintiff in favor of the residents of the State of Okla-

homa and that it denies him the equal protection of the law in violation of the first section of the Fourteenth Amendment to the Constitution of the United States and that it deprives him of the privileges and immunities enjoyed by residents of the State of Oklahoma in violation of Section 2 of Article 4 of the Constitution of the United States, for the reason that the net income of residents of the State of Oklahoma is made up from their income from all sources whether the property and business from which the same is derived is situated in or out of said state, and that the residents of the State of Oklahoma are entitled in computing their net income to deduct from the income from property and business within said state, all losses from investments or business situated or carried on in any other state if said losses are sufficient to bring the entire net income within the amount exempt from taxation, residents of said state are not required to pay any income tax at all; but plaintiff alleges that under the terms of said Section 1 of Chapter 164 of the Session Laws of Oklahoma of 1915, a non-resident of the State of Oklahoma is not permitted to deduct from the income derived from property invested in said state and from business carried on within said state, the losses sustained in other states and is required to pay on his entire net income within the state even though he may have sustained

losses from property or business in other states to such an extent as to reduce his entire net income from all of his property to such an extent as if he were a resident of the State of Oklahoma, he would not be required to pay any income tax.

He further alleges that the tax attempted to be levied upon him is in the nature of a property or excise tax and he alleges that if it is an excise tax, it is void because it deprives him of the privileges and immunities enjoyed by residents of the State of Oklahoma in violation of Section 2 of Article 4 of the Constitution of the United States for the reason that no resident of the State of Oklahoma is required to pay an excise tax upon any business of the same or similar nature as that in which this plaintiff is engaged in said state.

Plaintiff further alleges that said Chapter 164 is unconstitutional, null and void insofar as it attempts to tax the incomes of non-residents and that the tax attempted to be assessed against him is illegal and void because it attempts to tax him for the privileges of engaging in business in the State of Oklahoma. He alleges that the State of Oklahoma is without jurisdiction, power or authority to tax a natural person, a non-resident of the state, for the privilege of engaging in business in said state.

Plaintiff alleges that said tax attempted to be levied on the income from his property in the State of Oklahoma is illegal and void because it is in violation of Section 2 of Article 2 of the Constitution of the State of Oklahoma, which provides that, "all persons have the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry," in that it would, if collected, deprive him of the gains of his own industry. He alleges that said tax is illegal and void because it is in violation of Section 7 of Article 2 of the Constitution of the State of Oklahoma, for the reason that it will, if collected, deprive him of his property without due process of law.

Plaintiff further alleges that said tax is illegal and void for the reason that it violates Section 3 of Article 1 of the Constitution of the State of Oklahoma, and of the third subdivision of Section 3 of the Enabling Act under which Oklahoma was admitted to the Union (34 Stat. 268), which provides that land belonging to citizens of the United States residing without the limits of the state shall never be taxed at a higher rate than the land belonging to residents thereof; and also for the reason that it violates Section 5 of Article 10 of the Constitution of the State of Oklahoma, which provides that taxes shall be uniform on the same class of subjects. Plaintiff states that Chapter 164 of the Session Laws of

the State of Oklahoma for the year 1915 attempts to tax his income from property and business in the State of Oklahoma at a higher rate than incomes from the same sources of residents of the State of Oklahoma because said chapter does not provide for deducting from his income losses outside of the state, while a resident of the state can deduct from his income, losses from property or business outside of Oklahoma; and he alleges that said tax is in effect a tax on land, in that a tax on the income from land is a tax on land, and he alleges that said tax is not uniform for the same reason.

Plaintiff further alleges that the tax attempted to be levied by the provisions of Chapter 164 of the Session Laws of the State of Oklahoma of 1915, hereinabove referred to, while called an income tax, is in effect a property or excise tax insofar as it affects non-residents. He alleges that his entire income from property and business in the State of Oklahoma consists of the proceeds of oil and gas sold from producing properties in said state. He alleges that Chapter 39 of the Session Laws of Oklahoma of 1916 provides that every person, firm, association or corporation engaged in the production of petroleum or other crude oil; or other mineral oil or of natural gas, within the State of Oklahoma shall pay a tax equal to three per centum of the gross value of the production of such petroleum

or other crude oil or mineral oil or natural gas. He alleges that said chapter also provides as follows:

> "The payment of the taxes herein imposed shall be in full and in lieu of all taxes by the state, counties, cities, towns, townships, school districts, or other municipalities upon any property rights attached to or inherent in the right to said minerals, upon leases for the mining of asphalt and ores bearing lead, zinc, jack, gold, silver or copper or for petroleum or other crude oil or other mineral oil or for natural gas upon the mining rights and privileges for the minerals aforesaid belonging or appertaining to land, upon the machinery, appliances and equipment used in and around any well producing petroleum or other crude or mineral oil, or natural gas, or any mine producing asphalt, or any of the mineral ores aforesaid and actually used in the operation of such well or mine; and also upon the oil, gas, asphalt, or ores bearing minerals hereinabove mentioned during the tax year in which the same is produced, and upon any investment in any of the leases, rights, privileges, minerals or property hereinbefore in this paragraph mentioned or described; * * * ."

Plaintiff alleges that his entire income from property within the State of Oklahoma is derived from petroleum and other crude oil and mineral oil and natural gas produced from lands and leases in the state and that he has paid to the State of Oklahoma the three per centum of the gross value of the production of petroleum, crude and mineral oil and

natural gas produced by him in said state during the year 1916, and that by reason of said Act of 1916, commonly known as the Gross Production Tax Law and by reason of the payment of the said three per centum of the value of the gross production he is relieved from the payment of any income tax upon the income from said petroleum, mineral and crude oil and natural gas produced by him in said state, and that the attempted assessment of income tax is illegal and void because the payment of said gross production tax relieves him from said payment.

Plaintiff alleges that Section 7 of Chapter 107 of the Session Laws of Oklahoma of 1915 is as follows:

> "In all cases where the illegality of the tax is alleged to arise by reason of some action from which the laws provide no appeal, the aggrieved person shall pay the full amount of the taxes at the time and in the manner provided by law, and shall give notice to the officer collecting the taxes showing the grounds of complaint and that suit will be brought against the officer for recovery of them. It shall be the duty of such collecting officer to hold such taxes separate and apart from all other taxes collected by him, for a period of thirty days and if within such time summons shall be served upon such officer in a suit for recovery of such taxes, the officer shall further hold such taxes until the final determination of such suit. All such suits shall be

> brought in the court having jurisdiction thereof, and they shall have precedence therein; if, upon final determination of any such suit, the court shall determine that the taxes were illegally collected, as not being due the state, county or subdivision of the county, the court shall render judgment *showing the correct and legal amount of taxes due by such person,* and shall issue such order in accordance with the court's findings, and if such order shows that the taxes so paid are in excess of the legal and correct amount due, the collecting officer shall pay to such person the excess and shall take his receipt therefor."

Plaintiff states that said section has no application to income taxes and further alleges that the defendant, Howard, State Auditor, holds that said section has no application to income taxes and that he has refused to accept income taxes under the provisions of said Section 7 and has stated that if plaintiff should pay him the amount assessed against him, that he, the said auditor, would refuse to hold same as provided in said Section 7, and that he would pay the same into the State Treasury forthwith, and that he is now estopped to assert that said section gives a remedy for the recovery of said taxes.

Plaintiff alleges that by the terms of Section 7 of Chapter 164 of the Session Laws of 1915, the income tax attempted to be collected by the defendants herein, is levied for the current expenses of the

State Government of Oklahoma and he alleges that if the said sum of money claimed as his income tax is collected by the defendants, it will pass into the possession of the State of Oklahoma and that he cannot maintain an action or suit against said state to recover the same amount or any part thereof.

Plaintiff alleges that the official bond of the said defendant Howard is only for the sum of Five Thousand ($5000.00) Dollars; and that the official bond of the defendant Woofter is for the sum of Twenty Thousand ($20,000.00) Dollars and alleges that said defendants have not sufficient property subject to execution out of which to make the amount assessed against him for income taxes, in the event he should pay said amount to them and then recover a judgment against them therefor. He further alleges that said statute if applicable to income taxes does not constitute an adequate remedy for the reason that it makes no provision for the payment of interest on the amounts paid in pursuance thereto.

Plaintiff further alleges that under the terms and provisions of Section 11 of the said Chapter 164 of the Session Laws of the State of Oklahoma of 1915, income taxes are a lien upon all of the property of persons against whom same are assessed in the State of Oklahoma. He alleges that the State of Oklahoma is without jurisdiction, power or authority to create a lien upon any of his property for

taxes, other than that assessed against the property itself, and that the provisions of said Section 11 deprives him of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and that the same is unconstitutional, null and void; and he alleges that the attempt as made by said Section 11 and by the proceedings hereinabove referred to to affix a lien upon his said property, deprives him of the equal protection of the laws in violation of the first section of the Fourteenth Amendment to the Constitution of the United States, for the reason that it attempts to enforce a remedy against him that it does not have and cannot enforce against persons engaged in business in the State of Oklahoma who have no permanent investments therein. He alleges that he owns certain land in Creek County, Oklahoma, in fee simple and that said assessment and said tax warrant constitute a cloud upon his title to said land, and that said levy and said tax warrant also constitute a cloud upon the title to all of his personal property in the State of Oklahoma and particularly in Creek County, Oklahoma.

Plaintiff alleges that he is the owner of various oil and gas mining leases covering lands in Creek County, Oklahoma, and that he is advised that it is a matter of great doubt as to whether said leases are real or personal property in Oklahoma, but he

avers that said leases, in principle, constitute an interest in real property and he alleges that the defendants are asserting and claiming a lien upon all of his said property by virtue of said levy and tax warrant, and he alleges that said assessment and warrant create a cloud upon his title to all his property in Oklahoma, and particularly upon his lands and oil and gas mining leases in Creek County, Oklahoma.

Plaintiff alleges that he is without a plain, adequate and complete remedy at law against the defendants to prevent the collection of said sum of money, or to recover same if paid.

Wherefore, plaintiff prays that a temporary restraining order be granted enjoining and restraining the defendants, and each of them, from further proceeding to levy said tax warrant and from attempting to collect said sum of money attempted to be assessed against him, until such time as the application for a temporary injunction may be heard, that upon such hearing an interlocutory injunction may be granted, enjoining and restraining the defendants and each of them from levying said tax warrant and from claiming or demanding from the plaintiff said sum of money so attempted to be levied as taxes during the further pendency of this action, and that upon final hearing, the defendants and each of them, be enjoined and restrained from further

attempting to levy said tax warrant and from further attempting in any way to collect said sum of money so attempted to be levied and from claiming or demanding said sum of money from the plaintiff; and plaintiff further prays judgment for costs of suit and all proper relief.

The answer is as follows:

Answer to Plaintiff's Bill.

Come now the defendants, E. B. Howard, State Auditor, and John S. Woofter, Sheriff, and answering the bill of plaintiff filed herein says:

First. That the court has no power or jurisdiction to entertain the bill of plaintiff herein and grant the relief prayed for, for the reason that plaintiff has a plain, adequate and complete remedy at law, as provided by the income and general tax acts of the State of Oklahoma, which provide for an action at law wherein the matters alleged in plaintiff's bill may be fully determined.

Second. That plaintiff does not show himself entitled to equitable relief upon either of the grounds upon which equitable jurisdiction depends, in that he does not show that irreparable loss or irremediable damage will ensue, or that a multiplicity of suits will follow, or that a cloud will be cast upon

his property and that he will be damaged thereby, or any other ground of equitable cognizance.

Third. Plaintiff does not allege that he has sustained any losses in his business carried on in any other state so as to be entitled to any reduction on that account, and is therefore not entitled to be heard to complain upon that ground.

Fourth. For further answer to plaintiff's bill, defendants deny each and every allegation thereof, except the following, which are admitted:

Defendants admit that plaintiff is a resident of the State of Illinois; that defendants are residents of the State of Oklahoma, and occupy the official positions as stated in plaintiff's bill; that the State Auditor is charged with the duty of collecting the income taxes due the State of Oklahoma under its laws; that the plaintiff is and has been during the calendar year of 1916 engaged in business in the State of Oklahoma, from which business so carried on in said state, he has received a net income of $1,562,647.96, during the calendar year of 1916; that the statutory time for making report of his income in said state was extended by the auditor, and that when same was filed, and payment of the tax refused for the reasons therein stated, the said auditor issued a tax warrant against the property of the said plaintiff as directed by law, and delivered the same to the defendant sheriff for execution and return;

and that no part of the tax alleged to be due from plaintiff to the State of Oklahoma has been paid.

Fifth. Defendants deny that the laws of the State of Oklahoma, under which it is sought to collect the income tax from plaintiff, are void for the reasons alleged by plaintiff or for any other reason, and deny further that said laws work a discrimination against the plaintiff in favor of citizens of the State of Oklahoma.

Sixth. Defendants allege that the property or business from which plaintiff derives his income in this state is not of an intangible nature, but that the oil and gas produced by plaintiff are reduced to physical possession by said plaintiff, or his agents and employees in this state and, when sold, delivery thereof is made from within this state the same as any other physical property produced within the state, and that the situs of the income derived from said business is within the State of Oklahoma.

Seventh. Defendants deny that the State Auditor refused to accept payment of the tax as alleged by plaintiff, and avers that no tender thereof was made by plaintiff to said auditor. Defendants further deny that the official bond of said auditor is only $5000.00, but allege the fact to be that the amount of said bond is $50,000.00, and has been duly

executed, approved and filed by said auditor, as provided by law.

Wherefore, defendants pray the judgment of said court.

The affidavit is as follows:

State of Illinois, County of Cook—ss.

Before me, Elsie H. Lochner, a notary public within and for said county and state, personally appeared Charles B. Shaffer, who, being first duly sworn under oath, made the following statement:

I am a resident of the City of Chicago, in the State of Illinois, and have been a resident of the said city and state for more than five years last past. I have an office in the Fort Dearborn Bank Building, at 76 W. Monroe Street, in said city and state.

I am now engaged in the production of oil in several states of the United States and have been engaged in the oil business for a number of years. I am engaged in the production of oil in the State of Oklahoma and have been producing oil in said state since 1904 or 1905. I first began taking leases in 1904 on the Indian Territory side of Oklahoma.

I have purchased, owned, developed and operated a number of oil and gas mining leases in the State of Oklahoma, and I am the owner in fee simple of a small amount of land in said state, from

which oil is produced, but not more than one per cent of the total oil produced by me in said state is produced from land owned by me in fee simple, and probably considerably less than one per cent.

My principal office is in the Fort Dearborn Bank Building at 76 West Monroe Street, Chicago, Illinois, and all of the matters connected with the business of producing oil in Oklahoma, except the actual drilling, pumping and field work, are handled from said office.

Practically all of my sales of oil are authorized and made by me in Chicago, and practically all of my purchases are made by me from my office in Chicago. Nearly all of the supplies necessary for the business are purchased in Pittsburg and other manufacturing centers and shipped to Oklahoma and the contracts for such supplies or the orders for such supplies are given by me in Chicago. The only purchases that are made in Oklahoma are the fittings of a small value that are sometimes purchased by the field men, and also lumber for drilling rig purposes. I use some steel rigs, and where I do, I buy the steel rigs outside of the State of Oklahoma.

Since I have been engaged in the oil business in Oklahoma, I have sold practically all of the oil produced by me to the Prairie Oil & Gas Company, Consumers Refining Company, the National Refining Company, and the Pierce Oil Corporation. The

greater portion of the oil has been sold to the Prairie Oil & Gas Company and the Consumers Refining Company. The oil that I sold to the Prairie Oil & Gas Company was sold on division orders which were signed by me in Chicago. The Prairie connected its lines to my field tanks on the leases and received the oil there. I cannot say to what point they pipe the oil but I know that they have no refinery in Oklahoma and have every reason to believe that the oil was piped out of the state.

The oil received by the Consumers Refining Company, is piped by me to the tank farm of that company at Cushing and delivered in its tanks. The Consumers Refining Company is a West Virginia corporation and has its principal office in the City of Chicago, State of Illinois, and the contract for the sale of my oil to said company is made in Chicago. The oil that is delivered by me to the Consumers is refined by that company at its refinery in Cushing and the refined product is shipped out of Oklahoma as rapidly as cars can be obtained for shipping the products and as fast as a market can be obtained. During the past two or three years there has always been a market for the entire product and the only thing that has prevented the shipment of the products of the Consumers Refining Company as fast as manufactured has been inability to obtain facilities for shipping.

The oil I sold the National Refining Company went to their plant in Coffeyville, Kansas; some of it was delivered by me in the pipe line of the Milliken Pipe Line Company and some was shipped in tank cars. The contract with the National Refining Company was executed by me in Chicago.

The oil sold by me to the Pierce Oil Corporation was taken from tanks off the property. The contract with the Pierce Oil Corporation for the sale of this oil was made by me with that company in New York. The purchase price of all the oil sold by me to all of said companies was received by me at my office in the City of Chicago. I cannot now remember any sales to any person or corporation except those mentioned, during the year 1916. If I made sales to any one else, the sales were very small and very unimportant. During the present year I have sold a little oil to a man named Hillman. The greater portion of my sales to him was made pursuant to an agreement between me and the Sinclair Oil Company with reference to disposing of the oil produced from a lease known as the Marks lease, which is in litigation.

The payments for the oil that I sold the Prairie Oil & Gas Company during 1916 and all the time since I have been engaged in the business in Oklahoma, were drawn at Independence, Kansas, on the First National Bank of New York City, except pos-

sibly a few checks which were drawn at Independence, Kansas, on some bank in Kansas. I know that no check that I have received from the Prairie Oil & Gas Company has been drawn on an Oklahoma bank.

The Consumers Refining Company has paid for all oil sold by me to it by check drawn in Chicago on a Chicago bank.

The Pierce Oil Corporation paid for oil sold by me to it by check drawn either in New York or St. Louis, I am not sure which, and do not remember at what bank it was payable.

The National Refining Company paid for oil sold by me to it by check drawn at its office in Cleveland, Ohio, on some bank in Cleveland, I do not now remember the bank. I have been in the oil business practically all my business life. The oil business has always been my principal business and was the first business I ever engaged in. I give my personal attention to this business. I give my entire time, energy and business judgment to the production of oil. Successful operation of the oil business requires business skill and judgment and good management. Without proper management, the oil business will be as great a failure as any other class of business, and the amount of profits derived from it depend almost entirely upon the skill and ability with which it is managed.

The course of business hereinabove described was begun before Oklahoma was admitted into the Union and has continued ever since. There has been no change in the method of managing the business since the admission of the state into the Union and no change since any of the legislation of the state with reference to taxation has been put in force in that state. I have paid to the State of Oklahoma, the three per cent gross production tax provided by the statutes of said state on all of the oil produced by me since that statute went into effect. I have read what was shown me as a copy of bill of complaint brought by me against E. B. Howard and John S. Woofter to prevent the collection of income taxes claimed by the State of Oklahoma against me, and the statements of fact therein contained are true.

I consider my business in the various states as one business and have used the income from the entire business to make development in different states. I sustained considerable losses from the oil business in 1916 in Kansas, Texas and Wyoming, and I also lost some money on other investments outside of Oklahoma in the year 1916. I sustained a net loss in Kansas, Texas and Wyoming, together with certain notes that I had become security on and had to pay during that year, amounting altogether to about $290,000.00.

There has been a large decline in the production of oil from the properties producing oil in 1916 since the year 1916. I produced on the same properties in January, 1917, 23,000 barrels less oil than I produced in January, 1916. I produced in April, 1917, 79,811 barrels less oil from the same properties than I produced in April, 1916. I produced in August, 1917, 233,434 barrels less oil than I produced from the same property in August of 1916.

An oil and gas property does not produce indefinitely. When the oil is once taken out of land producing oil, it is gone and the investment goes with it. The income from oil and gas property is altogether different to the income from the loan of money or the rental of a building, which continues practically indefinitely. In order to keep up oil production it is necessary to continue a reinvestment of proceeds of the property and that has been my custom ever since I have been in business. I have never sold undeveloped leases. I have always developed if I thought a lease had oil value and where I did not consider it worth developing, I have surrendered it.

C. B. Shaffer.

Subscribed and sworn to before me this 15th day of October, A. D. 1917, Else H. Lochner, Notary Public. (Seal) My commission expires May 23, 1918.

By consent of all the parties the hearing was actually had at Oklahoma City on the 31st of October, 1917, in the Western District of Oklahoma, and the affidavit was not filed in the clerk's office of the Eastern District of Oklahoma until a few days later, but its contents were stated to the court and a copy was furnished the Attorney General of Oklahoma on the day of the hearing.

The errors assigned are as follows:

ASSIGNMENT *of* ERRORS.

Now on this 7th day of February, A. D. 1918, comes Charles B. Shaffer, plaintiff in the above entitled action, and says that the decree entered in the above entitled action on the 7th day of February, A. D. 1918, denying his application for a preliminary injunction, is erroneous and unjust to him, the said plaintiff, for the following reasons, which he assigns as error in said action and in said decree, to-wit:

1st. Because the court erred in denying the preliminary injunction prayed for in the amended bill of complaint;

2nd. Because the court erred in holding that the State of Oklahoma protects the plaintiff in the production, creation, receipt and enjoyment of his income from property within the state;

3rd. Because the court erred in holding that the tax in controversy in this action is not directed at either the plaintiff or at his property, but that it is directed at the privilege of making, producing, creating, receiving and enjoying the income itself;

4th. Because the court erred in holding that the State of Oklahoma could levy a tax upon the plaintiff for the privilege of making, producing, cre-

ating, receiving and enjoying an income when a like tax is not levied upon residents of the State of Oklahoma;

5th. Because the court erred in holding that there is no difference in the right of the United States Government to tax incomes of non-resident aliens from business and property within the United States, and the right of the State of Oklahoma to tax the income of non-residents of the state, citizens of the United States, from business and property within the State of Oklahoma;

6th. Because the court erred in holding and deciding that the provision of Section 11, of Chapter 164 of the Session Laws of Oklahoma of 1915, creating a lien upon all of his property in Oklahoma for the collection of the income tax sought to be enjoined in this action, was valid and constitutional;

7th. Because the court erred in holding and deciding that the provisions of Chapter 39 of the Session Laws of Oklahoma of 1916, with reference to a gross production tax from petroleum or other crude oil, or mineral oil, or natural gas, and especially the following provision to said chapter, to-wit:

> "The payment of the taxes herein imposed shall be in full and in lieu of all taxes by the state, counties, cities, towns, townships, school

districts, or other municipalities upon any property rights attached to or inherent in the right to said minerals, upon leases for the mining of asphalt and ores bearing lead, zinc, jack, gold, silver or copper or for petroleum or other crude oil or other mineral oil or for natural gas upon the mining rights and privileges for the minerals aforesaid belonging or appertaining to land, upon the machinery, appliances and equipment used in and around any well producing petroleum or other crude or mineral oil, or natural gas, or any mine producing asphalt, or any of the mineral ores aforesaid and actually used in the operation of such well or mine; and also upon the oil, gas, asphalt, or ores bearing minerals hereinabove mentioned during the tax year in which the same is produced, and upon any investment in any of the leases, rights, privileges, minerals or property hereinbefore in this paragraph mentioned or described; * * * "

and the payment of the tax provided for in said chapter by this plaintiff, did not relieve him from the payment of the income tax as attempted to be levied by Section 164;

8th. Because the court erred in holding that the tax in controversy in this action is a privilege tax and not a personal tax against the plaintiff;

9th. Because the court erred in holding and deciding that the tax attempted to be levied does not deprive the plaintiff of his property without due process of law;

10th. Because the court erred in holding and deciding that the tax attempted to be levied does not deprive plaintiff of the equal protection of the law;

11th. Because the court erred in not holding that the tax in question in this action is unconstitutional, illegal and void in violation of Section 1, of the Fourteenth Amendment to the Constitution of the United States, for the reason that it attempts to abridge the privileges and immunities of a citizen of the United States;

12th. Because the court erred in not holding and deciding that the tax in question in this action is unconstitutional, illegal and void and in violation of the Constitution of the United States, because it attempts to lay a burden upon interstate commerce;

13th. Because the court erred in refusing to hold and in not holding and deciding that the tax in question in this case is in violation of the provision of Section 2 of Article 4 of the Constitution of the United States, which provides that:

> "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states";

14th. Because the court erred in refusing to hold and in not holding that the tax in question in this action is unconstitutional, illegal and void, and an attempt to take plaintiff's property without due

process of law, for the reason that plaintiff's net income is largely produced from the exercise of his business skill, energy and judgment, all of which exists outside of the State of Oklahoma and not within the jurisdiction of said state;

15th. Because the court erred in refusing to hold and in not holding and deciding that the situs of his income, is at his place of residence in the State of Illinois, and not in the State of Oklahoma, and that the same is not subject to the taxing power of the State of Oklahoma; and

16th. Because the court erred in refusing to hold and in not holding and deciding that the provisions of Chapter 164 of the Session Laws of 1915 of the State of Oklahoma, with reference to income taxes, so far as the same attempts to levy an income tax upon the net income from all property owned, and of every business, trade or profession carried on in Oklahoma by persons residing elsewhere, are unconstitutional, illegal and void because such a tax takes the property of non-residents of Oklahoma and of this plaintiff without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and because the provisions of said chapter abridge the privileges and immunities of citizens of the United States and of this plaintiff, in violation of the Fourteenth Amend-

ment of the Constitution of the United States, and because the provisions of said chapter deprive this plaintiff of the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States, and because the provisions of said chapter violates the provision of Section 2 of Article 4 of the Constitution of the United States, which provides that, "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

Wherefore, plaintiff prays that the decree of this court denying and refusing a preliminary injunction in this action be reversed, and that this court be instructed and directed to grant a preliminary injunction during the further pendency of this action; for costs of appeal and all proper relief.

ARGUMENT *and* AUTHORITIES.

The assignments of error raise several questions. Some of the questions are raised from different standpoints. We will argue this case from two standpoints. We will view the tax first as a tax on income proper, considering income as a separate entity for the purpose of taxation, different from the property or business which produces it.

Viewed in that light, it is our contention:

1st. That the situs of the income is in Illinois, the state of appellant's residence, and that to tax the income not in the state, deprives appellant of his property without due process of law.

2nd. That the business skill, industry and energy of appellant is in Illinois, that it enters into the income and that Oklahoma has no right to tax the income of which his business skill, industry and energy form a part.

3rd. That the statute could not fix a lien on appellant's tangible property to secure the payment of the income tax.

We will then, while not admitting that the tax is a privilege tax, examine it from that standpoint and will contend:

1st. If it is a privilege tax, appellant is relieved from liability to pay it, by the payment of the Gross Production Tax required by Chapter 39 of the Session Laws of Oklahoma of 1916.

2nd. If the tax is a privilege tax and not discharged by the payment of the Gross Production Tax it is void because it deprives plaintiff of privileges and immunities enjoyed by citizens of Oklahoma; because it denies him the equal protection of the laws, and because it takes his property without due process of law.

3rd. If a privilege tax, it is void because it lays a burden on interstate commerce.

DIVISION A.

INCOME TAX NOT A PROPERTY OR PRIVILEGE TAX.

PROPOSITION I.

The Situs of the Income Sought to Be Taxed Is in Illinois and Not Subject to Taxation by the State of Oklahoma.

Under this proposition we will try to show:

1. The nature of the income tax provided for under the Oklahoma law;
2. What net income is;
3. That the tax is directed rather at persons than at tangible property or privileges;

4. That under the facts of this case the income is never in Oklahoma, and that its actual situs is in Illinois, and

5. That Oklahoma has no right to tax property not in the state, and that to do so takes property without due process of law.

1. What Is the Income Tax Under the Oklahoma Law?

In determining the question of the situs of the income in question it is necessary to ascertain what the income tax is under Oklahoma law. Article 10 of the Oklahoma Constitution contains a number of provisions with reference to advalorem taxation and then, in Section 12, gives the Legislature power to provide for the levy and collection of income, as well as other taxes. That section is as follows:

> "The legislature shall have power to provide for the levy and collection of license, franchise, gross revenue, excise, income, collateral and direct inheritance, legacy, and succession taxes; also graduated *income* taxes, graduated collateral and direct inheritance taxes, graduated legacy and succession taxes; also stamp, registration, production or other specific taxes." (Italics ours.)

This provision of the Oklahoma Constitution indicates clearly an intention to classify incomes as a

distinct subject of taxation. This section gives to income a meaning which separates and distinguishes it from all other subjects of taxation. The language of the first Section of Chapter 164 of the Oklahoma Session Laws of 1915 under which the tax in question here is sought to be collected, clearly shows the intention of the legislature to consider incomes as distinct subjects of taxation and income taxes as a distinct species of taxation, separate and apart from the property or business producing the income. The section is as follows:

> "Each and every person in this state shall be liable to an annual tax upon the entire net income of such person, arising or accruing *from all sources* during the preceding calendar year, *and a like tax* shall be levied, assessed, collected and paid annually upon the entire net income from all property owned, and of every business, trade or profession carried on in this state by persons residing elsewhere." (Italics ours.)

This statute levies the tax on the net income. It does not make any distinction as to the source of the income. The tax is the same on net incomes whether derived from farming operations, practicing law, or mining. It is the income that is taxed and not the business. This is the view taken by the Supreme Court of Wisconsin of a similar constitutional provision. The Wisconsin Constitution provides (Article VIII, Sec. 1, as amended in 1908), that "taxes

may also be imposed on incomes, privileges and occupations, which taxes may be graduated and progressive and r e a s o n a b l e exemptions may be provided.''

In *State* v. *Frear,* 148 Wis. 456, 134 N. W. 673, 26 Am. & Eng. Ann. Cas. 1147, the court refers to this provision (N. W. 688, Ann. Cas. 1163) and says (N. W. 689, Ann. Cas. 1164-65):

> ''Words could hardly be plainer to express that idea than the words used. From them it clearly appears that taxation of property and taxation of incomes are recognized as two separate and distinct things in the State Constitution, both may be levied and lawfully levied, because the Constitution says so. However philosophical the argument may be that taxation of rents received from property is in effect taxation of the property itself, the people of Wisconsin have said that 'property' means one thing and 'income' means another; in other words, that income taxation is not property taxation, as the words are used in the Wisconsin Constitution.''

We believe the same reasoning will apply to the use of the same term in the Constitution of Oklahoma.

In *Trefry* v. *Putnam,* (Mass.) 116 N. E. 904, referring to the provisions of the Massachusetts Constitution with reference to t a x e s on incomes, the court said:

> ''The fair and almost irresistible conclusion

from all these considerations is that the word 'income' in the Forty-fourth Amendment has a generic meaning and includes gains, profits and revenues."

See also:

> *Commonwealth* v. *Werth*, 116 Va. 604, 82 S. E. 695, Ann. Cas. 1916, D. 1263.

This court held in *Brushaber* v. *Union Pacific R. Co.*, 240 U. S. 1, 18, that the purpose of the 16th Amendment was to relieve all income taxes when imposed from apportionment from a consideration of the source whence the income was derived.

In *Pollock* v. *Farmers Loan & Trust Company*, 158 U. S. 601, 39 L. ed. 1108, the court stated the contention of counsel for the Government as follows:

> "The stress of the argument is thrown, however, on the assertion that an income tax is not a property tax at all; that it is not a real estate tax, or a crop tax, or a bond tax; that it is an assessment upon the *taxpayer* on account of his money *spending power* as shown by his revenue for the year preceding the assessment; that rents received, crops harvested, i n t e r e s t collected, have lost all connection with their origin, and although once not taxable have become transmuted in their new form into taxable subject-matter; in other words, that income is taxable irrespective of the source from whence it is derived.
>
> "This was the view entertained by Mr. Pitt as expressed in his celebrated speech on intro-

ducing his income tax law of 1799, and he did not hesitate to carry it to its logical conclusion. The English loan acts provided that the public dividends should be paid 'free of all t a x e s and charges whatsoever,' but Mr. Pitt successfully contended that the dividends for the purpose of the income tax were to be considered simply in relation to the recipient as so much income, and that the fund holder had no reason to complain. And this, said Mr. Gladstone, fifty-five years after, was the rational construction of the pledge."

This court refused to adopt the view of counsel for the Government and of Mr. Pitt and held that the income tax was in effect a tax on property. But it is our view that the Constitutional Convention of Oklahoma as well as the law-making bodies of some of the other states have accepted Mr. Pitt's view as to the nature of an income tax. The Oklahoma law taxes persons natural or artificial because of their ability to pay. The tax is not a tax on business or property as such, but on the intangible something known as income. If the word "income" has a separate and generic meaning under the Oklahoma Constitution, then Section 1 of Chapter 164 of the Session Laws of Oklahoma of 1915 must be held to apply only to income taxes as such. It will fail as to any other kind of taxes attempted to be levied, because in violation of Section 57 of Article 5 of the Constitution of Oklahoma, which provides that every act of the legislature, with three exceptions named, shall

embrace but one subject which shall be clearly expressed in its title. This objection to the statute was not raised by the bill in this case but is a circumstance showing that the legislature intended to tax incomes as such and not business or privileges or property.

But it is not necessary to make further argument or to cite additional authorities in support of our position that the income tax imposed by the Oklahoma law is a distinct species of taxation, different from license, privilege or advalorem taxes. The Attorney General of Oklahoma agreed with us on this proposition at the oral argument in the court below, and in his typewritten brief filed in the case in the lower court he said:

> "As we understand the above grant of taxing power, insofar as the income tax is concerned, income as distinguished from every other species of ownership, right or privilege, was designated as a proper subject for taxation. This income constitutes within itself a taxable entity, regardless of the source from which it springs, and has no relation to any particular property except that such income, must for jurisdictional purposes, have come from a business, trade, profession or property located within the taxing state. This does not, however, connect the taxable thing with any particular property, even though the entire income might have been derived from one particular class of property. The income which the state assumes to tax has been

set apart as a taxable asset growing out of the resources of the state or from the exercise of a business, trade or profession therein, and this income is to be considered as separate and apart from its source, whether coming from one business or property or more, or whether derived from the mixed ownership of various properties, in conjunction with the conduct of numerous business enterprises."

It will be noted that except for the purposes of jurisdiction the Attorney General is ready to divorce the income from the property or business from which it is derived. He is compelled to retain enough connection between the income and the property to give the state jurisdiction. Further along we will endeavor to show, why in this case, it is equally necessary for him to separate the income from the property producing it, for all purposes except jurisdictional.

2. What Is Net Income?

In order to ascertain the situs of a net income it is necessary to determine what the net income is. This court in *Stratton's Independence* v. *Howbert,* 231 U. S. 399, defined income to be "gain derived from capital, from labor, or from both combined." In *Trefry* v. *Putnam,* 116 N. E. 904, the Supreme Court of Massachusetts said:

"In its ordinary and popular meaning, 'in-

come' is the amount of actual wealth which comes to a person during a given period of time. At any single moment a person scarcely can be said to have income. The word in most, if not all, connections involves time as an essential element in its measurement or definition. It thus is differentiated from c a p i t a l or investment which commonly means the amount of wealth which a person has on a fixed date. Income may be derived from capital invested or in use, from labor, from the exercise of skill, ingenuity, or sound judgment, or from a combination of any or all of these factors. One of the most recent of its definitions is 'the gain derived from capital, from labor, or from *both combined.' Stratton's Independence* v. *Howbert*, 231 U. S. 399, 415, 34 Sup. Ct. 136, 140, 58 L. ed. 285.

"Doubtless it would be difficult to give a comprehensive definition which can be treated as universal and final. It is common speech for one to say that he made so much money during a particular twelve months and to mean thereby that he has increased his wealth to that amount. Such a remark made by one not engaged permanently or intermittently in business or any gainful occupation naturally means that by purchases or sales of property made in the exercise of good judgment he has augmented the total value of his property. The decisive word in the Forty-fourth Amendment is 'income.' That is a word which not only had been much discussed by legislators and in the press in connection with taxation, but which also is in every day use. The common meanings attached to it by lexicographers,

therefore, have weight in determining what the people may be supposed to have thought its signification to have been when voting for the amendment. It is defined as that 'gain * * * which proceeds from labor, business or property; commercial revenue or receipts of any kind including wages or salaries, the proceeds of agriculture or commerce, the rent of houses or the return on investments;' and also as 'the amount of money coming to a person or corporation within a specified time, whether as payments for services, interest or profit from investment.' Its usual synonyms are 'gain,' 'profit,' 'revenue.' It is used in this sense also by writers upon taxation and economics."

In *United States Glue Company* v. *Oak Creek*, 153 N. W. 241, the Supreme Court of Wisconsin said:

"It is well understood that many elements of business, other than the use of capital or the service of employes to perform the necessary labor, enters into the production of an income in the sense involved in taxation, and that the sources of such income are not absolutely separable, one from the other. The observations of the court in *Wilcox* v. *County Commissioners*, 103 Mass. 544, are enlightening and helpful. Income, in the sense of tax laws, is not the capital or stocks of goods in which the capital may be expended:

'It is the net result of many combined influences: The use of the capital invested; the personal labor and services of the members of the firm; the skill and ability with which they lay

> in, or from time to time renew, their stock; the carefulness and good judgment with which they sell and give credit; and the foresight and address with which they hold themselves prepared for the fluctuations and contingencies affecting the general commerce and business of the country'."

3. The Tax in Question Is More Nearly Directed at Persons Than at Tangible Property or Privilege.

Advalorem taxes are laid upon the theory that the property taxed should contribute to the support of the state in proportion to the protection given by the state and, therefore, according to its value. It costs the state no more to protect one million dollars worth of property in the hands of one man than in the hands of one thousand men (if as much), therefore, the same amount is collected from one million dollars' worth of property in the hands of one man as one million dollars' worth of property in the hands of one thousand men.

But income taxes are not laid upon any such theory. In *State* v. *Frear,* 148 Wis. 456, 134 N. W. 673, 26 Am. & Eng. Ann. Cas. 1147, the court said of the income tax:

> "The fundamental idea upon which its champions rest their argument in its favor, is that taxation should logically be imposed according to ability to pay, rather than upon the mere

possession of property, which for various reasons may produce no revenue to the owner.

> "It is argued that there should be as nearly as practicable equality of sacrifice among the various taxpayers, and that a tax levied at an uniform or proportional rate can rarely, if ever, produce equality of sacrifice; that 1 per cent of a small income, which just suffices to support its owner, is a far larger relative contribution to the public treasury, than 1 per cent of an income so large that it cannot be exhausted by its owner, except by means of lavish and extravagant expenditures."

In the report of the Minnesota State Tax Commission, for the year 1910, as quoted in Black on Income Taxes, 2nd ed. Sec. 197, appears the following:

> "In theory an income tax is an ideal one. Much property is necessarily carried by citizens of a state that is unproductive, and hence yields but little income out of which taxes may be paid; while, on the other hand, if the state only demands a part of the income actually earned, it works no hardship on its citizens. If each man paid taxes according to his income, those who have most would pay most and those who have least would pay least."

In other words, the theory of the income tax law is that people should pay in proportion to what they receive in a given time, without regard to what the property is worth from which they receive their income; and under the Oklahoma Statute whether they have an invested capital at all. They must pay on

their income from a trade or profession. The tax is directed against the individual and not against the property. *The income is considered as something separate and apart from any investment or business that may produce it.*

PROVISIONS OF OKLAHOMA LAW SHOW THAT TAX IS INTENDED AS A PERSONAL TAX.

The provisions of Section 1 of Chapter 164, show that the tax is directed against the individual receiving the income. It provides that "each and every person in this state, shall be liable," etc., and then provides that a "like tax shall be levied, assessed, collected and paid annually upon the entire net income from all property owned, and of every business, trade or profession carried on in this state by persons residing elsewhere." This language indicates that the tax is directed against the person and not against his property. It does not make any difference how the income is derived. The statute is directed against the recipient of the income whether he gets its from property, from business or from the practice of a profession. A lawyer living in Missouri or Arkansas but practicing law to some extent in Oklahoma would be subject to the Oklahoma income tax law if he made in Oklahoma more than the amount exempt by the income tax law.

That the tax is directed against the recipient of the income is more clearly shown, however, by other sections of the chapter. The second section requires each *person* liable for an income tax to make a return. It will be remembered that the tax is levied on the net income. The sixth section lays down the rule for computing the net income. The sixth section is as follows:

> "In computing the net income taxable under the provisions of this act, there shall be allowed as deductions from the income of any person:
>
> "*First.* The necessary expenses actually paid in carrying on any business, not including personal living or family expenses;
>
> "*Second.* All interest paid within the year by a taxable person on indebtedness:
>
> "*Third.* All state, county, school and municipal taxes paid within the year, not including those assessed against local benefits;
>
> "*Fourth.* Losses actually sustained during the year incurred in trade, or arising from fires or storms, and not compensated for by insurance or otherwise;
>
> "*Fifth.* Debts due to the taxpayer actually ascertained to be worthless and charged off within the year;
>
> "*Sixth.* A reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in the business not to

exceed in the case of mines, five per centum of the gross value, at the mine of the output for the year for which the compensation is made, but no deduction shall be made for any amount of expense of restoring property or making good the exhaustion thereof for which an allowance is or has been made: *Provided*, that no deduction shall be allowed for any amount paid out for new buildings, permanent improvements, or betterments, made to increase the value of any property or estate."

The allowance of interest is to a taxable person. A business pays no interest. A business does not borrow money. A man in business may borrow money but if he does he owes the money. All his property is liable for it. The Oklahoma Statute makes no provision for crediting a certain amount of interest against each piece of property. The allowance for debts also is for debts due to the tax payer. It would not be possible to make an allowance for debts in any other way. Financial debts are not owed to property or to trade or profession. No one owes a certain tract of land One Thousand ($1000.00) Dollars or a certain oil lease a like amount. The debt is owing to the owner of the property. The reading of the whole chapter shows clearly that the tax is directed against the income as such in the hands of the recipient and not against property or business at all.

The eighth section provides that an individual living with his or her spouse shall be allowed in addition to the $3,000.00 allowed to all as non-taxable, the further deduction of $1,000.00 and for each child under the age of eighteen years a further deduction of $300.00 and for each child engaged in acquiring an education a further deduction of $500.00. This is a personal exemption. In the trial court, answering the argument on another proposition in this case, the Attorney General asserted that the appellant has the same personal exemptions as a resident of Oklahoma. The tax therefore, is a personal tax. A business or a privilege would not have exemptions based on the family relations of the person exercising the privilege.

Section eleven provides that if any of the taxes levied by the act become delinquent "they shall become a lien on all the property, personal and real, of such *delinquent person.*"

The language of these statutes indicates that the tax is directed against the person who receives the income. The w o r d s "persons liable" in the fourth section, and the words "delinquent person" in the eleventh section indicate that the tax is directed against persons. The use of the word "derived" in the fifth section also indicates that some one has derived the income. It is used in this statute in the sense of received from. Webster gives

as one of the definitions of derive: "To draw from, as in a regular course or channel; to receive from a source or origin by regular conveyance; as, the heir *derives* an estate from his ancestors; we derive instruction from books." Now if the income is derived or received, who has derived or received it? The owner unquestionably.

That the tax in question is not intended as a privilege tax is clear from a reading of the entire statute in connection with the section of the Oklahoma Constitution conferring the power to levy the tax. Section 12 of Article 10 of the Oklahoma Constitution after providing that the Legislature shall have power to provide for the levy and collection of license, franchise, gross revenue, excise, income, collateral and direct inheritance, legacy, and succession taxes; further provides that it shall have power to levy "*graduated income taxes, graduated collateral and direct inheritance taxes, graduated legacy and succession taxes;* also stamp, registration, production or other specific taxes." The Constitution does not confer the power to levy graduated license, franchise, gross revenue, or excise taxes. It is hard to conceive of a privilege tax that would not be either a license, franchise, or excise tax. The Oklahoma Legislature has no power to graduate any such taxes. But the tax in question here is graduated. The seventh section of Chapter 164 of Oklahoma Session

Laws of 1915, graduates the tax laid making the rate higher proportionately on large incomes. The tax does not purport to be laid on any privilege. It would be remarkable if a privilege tax should be laid without specifying the privilege on which it was intended to be laid. We do not believe a state can tax the mere making of money as a privilege. It would have to confer a privilege before it could tax it. But we contend here that Oklahoma did not in its income tax law attempt or intend to tax a privilege, but intended to tax incomes as such, as a generic subject of taxation.

VIEWS OF OTHER COURTS.

Wisconsin has an income tax provision in her constitution and statutes very similar to Oklahoma, and her courts have had various phases of the income tax law before them. In *Manitowoc Gas Co. v. Wisconsin Tax Commission*, 152 N. W. 848, the court said:

> "Our income tax is a burden laid upon the *recipient of the income*, whether derived from real estate, personal property or labor, the amount of which is determined by the amount of the total net income derived from these sources, singly or combined." (Italics ours.)

In this case the court held that the interest due non-resident bondholders of a domestic corporation was not subject to the income tax. The court expressly

stated that it would not decide whether an income could have a situs different from that of the recipient, saying:

> "Whether an income may have a situs for taxing purposes different from that of its recipient is not determined."

In *State ex rel. Sallie F. Moon Co.* v. *Wisconsin Tax Commission*, 163 N. W. 639, the court said:

> "Much confusion of thought arises from regarding the income tax as a tax that is levied upon or attaches to property as such, irrespective of the person sought to be taxed. *It is the recipient of the income that is taxed,* not his property; and the vital question in each case is, Has the person sought to be taxed, received an income during the tax year? If so, such income unless specifically exempted, is subject to a tax though *the property out of* which it is paid may have been exempt from an income tax in the hands of the payor. It is the relation that exists between the person sought to be taxed and specific property claimed as income to him that determines whether there shall be a tax. If the person sought to be taxed is the recipient during the tax year of such specific property as income in its ordinary significance, then the person is taxed. *But the tax is upon the right or ability to produce, create, receive and enjoy, and not upon specific property.* Hence the amount of the tax is measured by the amount of the income, irrespective of the amount of specific property or ability necessary to produce

or create it. In the ordinary acceptation of the terms this may be said to be a tax upon income as the statute denominates it. But the tax does not *seek to reach property,* or an interest in property as such. *It is a burden laid upon the recipient of an income. State ex rel. Manitowoc Gas Co.* v. *Wis. Tax Comm.,* 161 Wis. 111, 152 N. W. 848; *State ex rel. Bundy* v. *Nygaard,* 163 Wis. 307, 158 N. W. 87." (Italics ours.)

The case of *United States Glue Co.* v. *Oak Creek,* 153 N. W. 241, was appealed to this court and affirmed on the 3rd of June, 1918. The exact question here was not before this court in that case, but in the course of its opinion this court, referring to the case of *Peck & Co.* v. *Lowe,* decided by this court May 20, 1918, said:

> "The distinction between a direct and an indirect burden by way of the tax or duty was developed, and it was shown that an income tax laid generally on net incomes, not on incomes from exportation because of its source, or in the way of discrimination, but just as it was laid on other income, and affecting only the net receipts from exportation after all expenses were paid and losses adjusted and the *recipient of the income* was free to use it as he chose, was only an indirect burden." (Italics ours.)

The court uses practically the same language in *Peck* v. *Lowe, supra.* The rule laid down in *United States Glue Co.* v. *Oak Creek,* 153 N. W. 241, and in

Peck v. *Lowe, supra,* applies also to taxable incomes under the Oklahoma law.

4. Under the Facts of This Case Appellant's Income Is Never in Oklahoma. Its Situs Is in Illinois.

It appears from the bill of complaint and the affidavits filed herein that the appellant manages his business from his office in Chicago. He devotes his time, energy and business judgment to the business. He makes his purchases of supplies and materials, with minor exceptions, from his office in Chicago, buying outside of Oklahoma and having it shipped in. *The contracts for the sale of oil are made by him in Chicago with non-residents of Oklahoma and these non-residents pay him by checks drawn at their offices outside of the State of Oklahoma on banks outside of the state and send the checks to him in Chicago. The actual money constituting his income is never here.* The net income, which is all the state is attempting to tax, is never here. He does not call on the state to assist him in collecting his income, and if any of the non-residents to whom he sells oil should breach their contracts in any way he would not call on the courts of Oklahoma for redress. He could sue at the domicile of the different vendees. He states in his affidavit that this has been his method of conducting his business ever since he has been producing oil in Oklahoma. He

did not adopt this course in order to evade taxation, but because it was the best way to manage his business. When he first began producing oil here in what was then the Indian Territory, there were no taxes. He could have saved taxes by establishing his domicile here. It is not material why he lives in Chicago rather than Oklahoma (Judson Taxation, 2nd ed., section 478), but the facts are as stated.

If income for purpose of taxation is a generic subject of taxation, separate from the source from which it is derived, then appellant's income is with him in Chicago and not in Oklahoma at all. If we look to the facts as to where the money constituting his income is, or was at the time he received it, then it was never in Oklahoma. Unquestionably unless the income tax is a tax on the source of the income, and not on the income itself, considered as a separate entity, the subject of taxation in this case is in Chicago.

Suppose appellant sitting in his office in Chicago, bought a piece of real estate situated in Oklahoma for One Hundred Thousand Dollars, kept it a year and still, sitting in his office in Chicago, sold the property for Two Hundred Thousand Dollars to another resident of Chicago. Would Oklahoma have the right to tax the Hundred Thousand Dollars net income so received? Suppose the appellant in Chicago bought a valuable building in one of

the larger places in Oklahoma and then some other citizen of Chicago walked into his office and made a contract by which he rented the building from appellant and then at the usual rental periods went into appellant's office in Chicago and paid the rent. Could Oklahoma tax the income so received? The situs of the income would be in Chicago. What is the difference in the hypothetical cases stated, especially the last one, and the case presented here?

Income must not be confused with a chose in action. An income is not a chose in action. It is not a mere promise or expectation. It is something already derived or received. It is in the hands of the owner at the time it is derived. The income springs into existence at the time it is received, *or if there is a difference, the money from which the income is made up is with the owner before it has taken the form of net income.* The owner gets the gross proceeds and out of the gross sums pays some expenses and the remainder constitutes the taxable income under the Oklahoma law. *There is no taxable income until the owner has received the money and paid expenses out of it.* The situs of this taxable entity called income must be at the residence of the owner.

The cases in which the courts have held that choses in action may acquire a situs different from the residence of the owner are not in point in this

case. A chose in action has not yet been paid. The debtor has only promised to pay it and its value depends on the promise of the debtor. The actual money to pay the chose in action is in the state where he resides.

But here the income is derived, paid and received. It is out of the state and there is nothing in the state that represents it. It is a confusion of ideas to say that it is represented by the property or business in the state. It was derived from the property or business but it is not represented by it. The Oklahoma statute also attempts to lay the tax on incomes from trade or profession exercised in the state by non-residents. This shows clearly and conclusively that the Legislature did not intend to make the collection of the tax depend in any way upon anything within the state representing the income. The Joplin lawyer who practices in Miami in this state and makes there more than the amount of income exempted by our statute (as we believe some Joplin firms do), has nothing in the state representing the income. He is employed at Joplin, comes over to Miami and tries his cases. Later the Oklahoma client drops into his Joplin office and pays him. The situs of that income is Joplin. The Legislature makes no difference in attempting to tax this man, and the person who owns property here. The state is after the income not the property. The

income is not a chose in action but in possession *and in this case, in fact as well as in law,* is at the residence of the owner. The usual rule is that movables follow and have their situs at the residence of the owner. That rule is in some cases a mere fiction adopted for the purposes of convenience and can be changed by the Legislature when it has any jurisdiction at all. But there is a limit to this power. Situs is determined by the facts. See *Adams* v. *Colonial etc. Mortgage Co.,* 82 Miss. 263, 17 L. R. A. (N. S.) 138, 100 Am. St. Rep. 633.

The income upon which the tax in question in this case is sought to be levied does not exist in Oklahoma. It is not owing by anyone in Oklahoma to the plaintiff and no one in Oklahoma ever owed it to him. He has already received it. The theory upon which the state of the debtor's residence is permitted to tax a chose in action is that the state may be called upon by the creditor to enforce the obligation. But Oklahoma will not be called upon and *cannot be called upon to enforce the collection of the income of plaintiff.* It is not income at all until he receives it. The distinction between income as such and a mere chose in action is very clear.

Not only is there a distinction between income and a chose in action in every case, but there is a stronger distinction in this particular case. Plain-

tiff's income from sales of oil produced in Oklahoma is never in the state.

There can be no grounds for any fiction establishing the situs of his income here when he, the owner, lives in Chicago and the income is actually there and has never actually been in Oklahoma. When the proceeds of appellant's business here takes the form of income it is already in his hands. It no longer pertains to the business. The expense of the business has been paid and the net profits are out of the business. Even if the money received from the business here were temporarily deposited in Oklahoma banks to appellant's credit not for the purpose of reinvestment in this state, it would not be taxable here. *Pyle* v. *Brenneman*, 122 Fed. 787; *State* v. *Clement National Bank*, 78 Atl. 947; Ann. Cas. 1912-D, 22. *Marr* v. *Vienna*, 10 Upper Canada L. J. 275; *Matter of Ashworth*, 7 Can. L. J. 47.

In *Orleans Parish* v. *New York Life Insurance Company*, 216 U. S. 517, this court said:

> "The account in question consists of deposits made solely for transmission to New York and not used or drawn against by any one in Louisiana. We shall not inquire whether it would or would not be within the constitutional possibilities for a state to tax a person outside its jurisdiction for a bank deposit that only became his or came into existence as property at

the moment of beginning a transit to him, and that thereafter left the state forthwith."

These sentences indicate great doubt in the court's mind (if nothing more) as to the validity of such a tax.

District Judge COTTERAL in his concurring opinion in the lower court in this case refers to cases holding that a chose in action may be taxed in the state where the debtor resides. This rule is settled by decision of this court. If an income already received is not distinguishable from a chose in action some incomes might be taxed. Even then under the facts in this case, the income in controversy here would not be taxable. But an income is not a chose in action. It is entirely separate and entirely different. It is already received.

We presume it would not be contended that Oklahoma could tax money as money, belonging to the appellant, because he made it in Oklahoma. The fact that he got money from Oklahoma property would not justify the State of Oklahoma in following it over into Illinois and taxing it there.

Circuit Judge STONE in his opinion says:

"It is true the tax on the income is not upon the business conducted, but it is also true that the income springs therefrom and, following the situs thereof, as a child takes legally

the residence of the parent, it carries the right of taxation with it."

The comparison between child and parent does not seem to be in point. In the first place the fact that the income involved in this case is derived partly from property is a fortuitous circumstance. The statute attempts to tax incomes from whatever source derived. A doctor living near the line and practicing over in Oklahoma would be subject to the tax. The terms of the statute makes his income so obtained as much subject to an income tax as if he had derived it from the rental of real estate. *The fact that the statute does not make any distinction as to the source from which the income was derived is the strongest sort of proof that the Legislature considered an income a separate entity, and its taxability not in any way affected by its source.* In the case of the doctor it could not be said that the situs of the source of his income is in Oklahoma. His income would be derived from his skill as a physician and while he would have his skill with him when he visited patients in Oklahoma, still it would not be domiciled in Oklahoma. It would be domiciled in his home. A child takes the domicile of its father, but when the child reaches majority, and permanently leaves the father it acquires a new domicile.

5. Oklahoma Cannot Tax Property Not in the State. To Do So Would Be to Take Property Without Due Process of Law.

Nothing is better settled than that a state has no extra territorial jurisdiction for taxing purposes and that the taxing of property beyond the jurisdiction is not due process of law.

> "All subjects over which the sovereign power of a state extends are objects of taxation; but those over which it does not extend, are upon the soundest principles exempt from taxation. This proposition may almost be pronounced self evident."
>
> —*McCulloch* v. *Maryland*, 4 Wheat. 316, 4 L. ed. 579.

In *Cleveland etc. R. Co.* v. *Pennsylvania* (State Tax on Foreign Held Bonds), 15 Wall. 300, 21 L. ed. 179, Justice Stephen J. Field said:

> "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property and business. Whatever form taxation may assume, whether as duties, imposts, excises or license, it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to them, the taxation may be exercised in a great variety of ways. It may touch property in every shape in its natural condition, in its manufactured form,

and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufacture, and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the state as to the mode, form and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction."

Further along in the opinion Mr. Justice FIELD said:

"It is undoubtedly true that the actual situs of personal property which has a visible and tangible existence, and not the domicile of its owner, will, in many cases, determine the state in which it may be taxed. The same thing is true of public securities consisting of state bonds and bonds of municipal bodies, and circulating notes of banking institutions; the former, by general usage, have acquired the character of and are treated as property, in the place where they are found, though removed from the domicile of the owner; the latter are treated and pass as money wherever they are. But other personal property, consisting of bonds, mortgages and debts generally, has no situs independent of the domicile of the owner, and certainly can have none where the instruments, as in the present case, constituting the evidences of debt, are not separated from the possession of the owners."

Further in the opinion, the court said:

> "The tax laws of Pennsylvania can have no extraterritorial operation; nor can any law of that state, inconsistent with the terms of a contract, made with or payable to parties out of the state, have any effect upon the contract whilst it is in the hands of such parties or other non-residents."

In *New York L. E. & W. R. R. Co.* v. *Pennsylvania,* 153 U. S. 628, 38 L. ed. 846, the court said:

> "No principle is better settled than that the power of a state, even its power of taxation, in respect to property, is limited to such as is within its jurisdiction. *Cleveland P. & A. R. Co.* v. *Pennsylvania* ('State Tax on Foreign Held Bonds'), 82 U. S. 15 Wall. 300, 319 (20: 179, 186); *Northern Cent. R. Co.* v. *Jackson,* 74 U. S. 7 Wall. 262 (19: 88); *St. Louis* v. *Wiggins Ferry Co.,* 78 U. S. 11 Wall. 423 (20: 192); *Minot* v. *Philadelphia, D. & B. R. Co.* ('Delaware R. Tax'), 85 U. S. 18 Wall. 206 (21: 888)."

In *Union Refrigerator Transit Company* v. *Kentucky,* 199 U. S. 194, 50 L. ed. 150, the court held that due process of law was denied a Kentucky corporation by a tax assessed upon its rolling stock permanently located in other states and employed there in the prosecution of its business. The court said:

> "The power of taxation, indispensable to the exercise of every civilized government, is

exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public convenience in which he shares —such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise benefit the person or property taxed, and such property be wholly within the taxing power of another state, to which it may be said to owe an allegiance, and to which it looks for protection, the taxation of such property within the domicile of the other partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this court to be beyond the power of the Legislature, and a taking of property without due process of law, *Northern C. R. Co.* v. *Jackson*, 7 Wall. 262, 19 L. ed. 88; *State Tax on Foreign Held Bonds*, 15 Wall. 300, 21 L. ed. 179; *Tappan* v. *Merchants' Nat. Bank*, 19 Wall. 490-499, 22 L. ed. 189-193; *Delaware L. & W. R. Co.* v. *Pennsylvania*, 198 U. S. 341, 358, 49 L. ed. 1077, 1083, 25 Sup. Ct. Rep. 669. In *Chicago B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581, it was held, after full consideration, that the taking of private property without compensation was a denial of due process within the Fourteenth Amendment. See also, *Davidson* v. *New Orleans*, 96 U. S. 97, 102, 24 L. ed. 616, 618; *Missouri P. R. Co.* v. *Nebraska*, 164 U. S. 403, 417, 41 L. ed. 489, 495, 17 Sup. Ct. Rep. 130, *Mt.*

> *Hope Cemetery* v. *Boston,* 158 Mass. 509, 519, 35 Am. St. Rep. 515, 33 N. E. 695."

The court in its opinion, further says:

> "It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of state laws limited to persons and property within the boundaries of the state, but property which is wholly and exclusively within the jurisdiction of another state receives none of the protection for which the tax is supposed to be the compensation."

In *Western Union Telegraph Company* v. *Kansas,* 216 U. S. 1-38, the court said:

> "It is firmly established that, consistently with the due process clause of the Constitution of the United States, a state cannot tax property located or existing permanently beyond its limits. *Louisville etc.* v. *Kentucky,* 188 U. S. 385, 398; *Union Transit Co.* v. *Kentucky,* 199 U. S. 194, 209."

See also *Railroad Co.* v. *Jackson,* 7 Wall. 262, 267; *Pullman Co.* v. *Pennsylvania,* 141 U. S. 18.

In *Delaware Lackawanna & Western R. Co.* v. *Pennsylvania,* 198 U. S. 341, 49 L. ed. 1077, the authorities assessed the capital stock of the railroad company without deducting therefrom the value of certain coal belonging to the company, held and owned by it in another state but which had been

shipped out of Pennsylvania by it. This court held that the value of the coal must be deducted from the capital stock. The court held that the tax on the capital stock was in fact a tax on the property represented thereby and that so much of the property as was out of the state was not subject to taxation. Among other things, the court said:

> "The only question for this court to determine is whether, in refusing to deduct the value of the coal mined in Pennsylvania, and which, at the time of the appraisement, was situated outside the jurisdiction of the state, from the value of the capital stock, the state court denied any right of the plaintiff in error which was protected by the Federal Constitution.
>
> "The coal itself, when the appraisement of the value of the capital stock was made, was concededly beyond the jurisdiction of the State of Pennsylvania. It was taxable (and in fact was taxed) in the states where it rested for the purpose of sale, at the time when the appraisement in question was made. *Brown* v. *Houston,* 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091. In that case the court held that the coal was properly taxed by the State of Louisiana, though it had but lately arrived from the state of its origin (Pennsylvania), and was, at the time of the taxation, awaiting sale in Louisiana, and was, in fact, soon thereafter, sold and taken out of the country to a foreign state. It was said that the coal, on arrival at New Orleans for the purpose of sale, at once became inter-

mingled with the general property of the State of Louisiana, and was taxable like any other tangible property therein. In *Coe* v. *Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475, the question was relative to the validity of the tax on the lumber imposed in the state of its origin, as that state had taxed the lumber before it had actually left the state, although it was intended for transportation to another state for sale. It was held that the tax was proper, so long, and so long only, as such transportation had not yet actually commenced. After that the state had no right to tax it. In the case at bar the coal had been transported to and was actually resting in another state for sale when the appraisement was made, and under the foregoing cases, it was then intermingled with property in the foreign state where it rested, and was at that time liable to taxation therein. The right of the foreign state to tax under such circumstances was again upheld in *Pittsburg & S. Coal Co.* v. *Bates*, 156 U. S. 577, 39 L. ed. 538, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415, where the coal was taxed while awaiting sale in such state. See *Kelley* v. *Rhoads*, 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. Rep. 259; *Diamond Match Co.* v. *Ontonagon*, 188 U. S. 82, 47 L. ed. 394, 23 Sup. Ct. Rep. 266. We must, therefore, take it as plain, under the foregoing decisions, that this coal, at the time of the appraisement of the value of the capital stock for taxation by Pennsylvania, had become intermingled with the mass of property in the other states, to which portions of it had respectively been sent, and that

it was a proper subject for taxation for both state and local purposes in such states. Where the proceeds of the sale might go when the coal was sold, whether into the treasury of the company, at its offices in New York City, or indirectly to the state of its incorporation, is not important. The coal had not been sold when the appraisement of the value of the capital stock was made, and at that time it was outside the jurisdiction of the State of Pennsylvania. A tax on that coal, *eo nomine,* or specifically, could not then be laid by that state, as counsel concede. * * *

"It is also said that, by reason of the alleged transitory character of the coal, it has never, in law, lost its original domicile, which still remains in Pennsylvania, and is subject to be there included in the value of the capital stock of the corporation.

"The asserted transitory nature of this property does not seem to us to be material. At the time of the appraisement it had been transported beyond the jurisdiction of the state, never to return in kind but was intended to be sold in the foreign state. Such property is entirely unlike the property involved in *Com.* v. *American Dredging Co.,* 122 Pa. 386, 1 L. R. A. 237, 2 Inters. Com. Rep. 221, 9 Am. St. Rep. 116, 15 Atl. 443. That property consisted of vessels, or scows, or tugs, only temporarily out of the state of Pennsylvania, for the purpose of engaging in business, and liable to return to the state at any time, and was without any actual situs beyond the jurisdiction of the state itself.

However temporary the stay of the coal might be in the particular foreign state where it was resting at the time of the appraisement, it was definitely and forever beyond the jurisdiction of Pennsylvania. And it was within the jurisdiction of the foreign states for purposes of taxation, and in truth it was there taxed. We regard this tax as, in substance and fact, though not in form, a tax specifically levied upon the property of the corporation, and part of that property is outside and beyond the jurisdiction of the state which thus assumes to tax it. This is not a question as between direct or indirect taxation, such as arises under the Federal Constitution when Congress lays and collects taxes by virtue of the power given it by that instrument. No question of uniformity or apportionment of taxes arises here. The question now discussed is simply whether, under this statute of the state, property of the corporation is, in substance and effect, taxed while it is beyond the jurisdiction of the state, and is never to return. When the Federal Constitution says no tax or duty shall be laid on articles exported from any state, such articles cannot be taxed, directly or indirectly, and a tax on foreign bills of lading is void because it, in effect, is a tax on exports. *Fairbank* v. *United States,* 181 U. S. 283-289, 45 L. ed. 862-865, 21 Sup. Ct. Rep. 648.

"So, if the state cannot tax tangible property permanently outside the state, and having no situs within the state, it cannot attain the same end by taxing the enhanced value of the

capital stock of the corporation which arises from the value of the property beyond the jurisdiction of the state.

"We think the state court is right in deducting, as it does, the value of the tangible property, when permanently held in another state, and we think that for the same reason the same rule should obtain in the case of tangible property situated as this coal was. We cannot see the distinction, so far as the question now before the court is concerned, between a tax assessed upon property, *eo nomine,* or specifically, when outside the state, and a tax assessed against the corporation upon the value of its capital stock to the extent of the value of such property, and which stock represents, to that extent, that very property. If the property itself could not be specifically taxed, because outside the jurisdiction of the state, how does the tax become legal by providing for assessing the tax on the value of the capital stock to the extent it represents that property, and from which the stock obtains its increased values? Can the mere name of the tax alter its nature in such case? If so, the way is found for taxing property wholly beyond the jurisdiction of the taxing power by calling it a tax on the value of capital stock, or something else which represents that property. Such a tax, in its nature, by whatever name it may be called, is a tax upon the specific property which gives the added value to the capital stock. * * *

"The next question is whether there is a right to relief in a case like this, founded u

the provisions of the Federal Constitution. We think there is. The collection of a tax under such circumstances would amount to the taking of property without due process of law, and a citizen is protected from such taking by the Fourteenth Amendment. * * *

"It is plain that in the case at bar the coal had lost its situs in Pennsylvania by being transported from that state to foreign states for the purposes of sale, with no intention that it should ever return to its state of origin. It was, therefore, as much outside the jurisdiction of the State of Pennsylvania to tax it as was the Indiana franchise in the case just cited, and it has been taxed just as directly and specifically under the facts stated in this case as was the Indiana franchise taxed in Kentucky by the valuation of the Kentucky franchise, which value was increased by the value of the franchise created by Indiana taxation of the coal in this case deprived the owner of its property without due process of law, as is held in the above case, and the owner is entitled to the protection of the Fourteenth Amendment, which prevents the taking of its property in that way."

The Attorney General as well as the majority judges below seem to believe that because appellant made money here, it could be taxed here. In the case just quoted, the coal was produced in Pennsylvania, but the court held that after it left the state it could not be taxed indirectly by taxing

capital stock of the company, but that its value must be deducted from the capital stock.

INHERITANCE TAXES REST ON ENTIRELY DIFFERENT BASIS.

This court decided in *Blackstone* v. *Miller*, 188 U. S. 189, 47 L. ed. 439, that a state could tax the transfer, under the will of a non-resident, of debts due the decedent by its citizens. This decision was based on the ground that the state levying the tax, had jurisdiction over the debtor who owed the debt. The debt was in the state. As suggested by the court in that case, the state levying the tax could have provided that the death of the creditor extinguished the debt. The right to inherit property is not an absolute right. It exists by the grace of the state in which the property is situated. *The right as well as the property is within the state* and *the right* depends on the will of the state.

Appellant's right to engage in business in Oklahoma is not dependent on the consent of the state. He is a natural person and the state cannot prevent him from engaging in business here on the same footing with residents of the state. *His income is not here.*

THE JURISDICTION OF FEDERAL GOVERNMENT OVER INCOMES OF ALIENS GREATER THAN THAT OF THE STATES OVER NON-RESIDENTS.

The Attorney General of Oklahoma, as well as Judge STONE of the lower court, seem to consider as the final and unanswerable argument in favor of the tax, the fact that the United States Government has always asserted the right to tax the incomes of non-resident aliens from property or business within the United States. Mr. Black in his work on income taxes, 3rd ed., Sec. 47, says that the right of the United States to tax incomes of non-residents has never been authoritatively settled. We do not care though to argue that proposition. There is a wide distinction between the power of the Federal Government and the power of a state in matters of taxation. *U. S.* v. *Barnett,* 232 U. S. 299. There is a vast distinction between the right of the Federal Government as against aliens and the right of the state against a citizen of another state. The Federal Government can prevent aliens from coming into this country, and may deport them after they come. *Chae Chang Ping* v. *U. S.,* 130 U. S. 581, 32 L. ed. 1068; *U. S. ex rel. Turner* v. *Williams,* 194 U. S. 279, 48 L. ed. 979, and cases there cited; Willoughby on the Const., Sec. 124; *Fong Yue Ting* v. *U. S.,* 149 U. S. 968, 37 L. ed. 905. Unquestionably

the Government has the power to prescribe the terms upon which aliens may engage in business in this country, or prevent them from engaging in business at all. The Government has complete control, jurisdiction and authority over the property and business of a non-resident and can and does collect the income from his business at its source. Sec. 1205, War Revenue Act of Oct. 3, 1917. But the State of Oklahoma cannot prevent the appellant from engaging in business in said state upon the same footing as her own citizens. It cannot prevent him from piping his oil out of the state and receiving the pay for it at his home in Illinois. It cannot collect the tax on his income at the source and makes no attempt to do so. The cases are not alike. The alien engages in business in this country by the grace of the Government, but appellant has the absolute right under the Constitution to the same privileges and immunities in Oklahoma that her own citizens have. It would be a real calamity to this country for this court to decide that a state could withhold at the source, the tax on the income of a natural person, a citizen of another state, derived from business or property in the taxing state. It would be an intolerable burden on interstate commerce. In this case the appellant would not be able to sell his oil or collect for it until he had first satisfied the State of Oklahoma. As the amount of his

net income could not be known before the expiration of the year, he would have to keep a large sum of money within the control of the state all through the year, or else the state would be continually interfering with his shipments and the sale of the oil would be interfered with. The tax is not on the oil as such but on income that has no abiding place in Oklahoma and that is not under its control.

Proposition II.

Oklahoma Cannot Tax the Business, Skill, Ability and Energy of Plaintiff.

We have endeavored to show that industry, judgment and ability are essential ingredients of an income. These things enter into the income in question. Appellant is engaged in an active business. That mining is a business was decided in *Stratton's Independence* v. *Howbert*, 231 U. S. 399. The appellant purchases the leases, drills oil wells and sells the products of the wells. There can be no question but that the success of such a business depends upon the skill and ability with which it is managed. It is very evident that in the management of the large business carried on by the appellant in this state, and in the expenditure of the large sums of money he spends here, there is ample room for the exercise of judgment, foresight, business skill

and ability. All of these are with the appellant, as part of him, and are outside of the State of Oklahoma. Surely the State of Oklahoma has no right or power to tax the time, labor, industry and skill of a resident of another state and existing within that state. It must not be forgotten that it is the net income that is attempted to be taxed. The personality of the appellant, a non-resident of this state, enters into this income as an essential part of it. The State of Oklahoma cannot reach out its arm beyond the borders of the state to tax a man who has never resided here, and to tax a man upon his ability, energy and industry when he has nev[er re]sided in this state.

The majority opinions below do not exactly say this proposition is frivolous, but they give it scan[t] consideration. Judge STONE says in effect that as there is no way to separate the elements of an income, the matter of business judgment that enters into it may be taxed though in another state. He puts this on the ground that the state protects the income. He says the tax is really on the privilege of making and enjoying the income. We have already referred to this matter of privilege, and will refer to it again, merely saying now that appellant is not a corporation but an individual citizen of the United States with the right to engage in business in Oklahoma without let or hindrance and the state

cannot tax his privilege to engage in business here without taxing the same privilege in every one of its own citizens. But this is not a privilege tax, as we believe we have shown already in this brief. Judge Cotteral says that the element of personal ability or services in acquiring an income may be disregarded. Maybe so, but we want to know why. Suppose appellant should decide to charge the business a million dollars a year for personal services. Would the State of Oklahoma agree to that? It would not. It would say that the million was a part of the income from his business in Oklahoma and would tax or try to tax him on it. And yet another man might lack a million of making as much money out of it as plaintiff did in 1916. *If he hired a man in Chicago to run his business in Oklahoma he could deduct his salary from the gross income in arriving at the net income.*

Judge Cotteral further says that, "It (the element of personal services) enters into all income and causes the returns from an occupation. But it has not been deemed important in the taxation of property, and need not be deducted from an assessment." We fail to see the analogy between physical property and an income. Taxes on property have reference only to its value and have nothing to do with the way the property was acquired. That is our contention with reference to an income tax.

But the Legislature of Oklahoma while following that principle in taxing residents, departs from it when attempting to reach non-residents and undertakes to make the right to lay taxes on their incomes depend on the source. It arbitrarily establishes a source and does not take into consideration that one of the most important elements is outside of the state.

THERE IS A DIFFERENCE BETWEEN CORPORATIONS AND INDIVIDUALS IN THIS REGARD.

It must not be forgotten that the income in question here is the income of a natural person and not a corporation. There is a wide distinction. A corporation is a creature of the law. It is a legal fiction. It exists by reason of its franchise, and a foreign corporation coming into Oklahoma, brings its franchise with it and its personality is here. But there is no fiction with reference to a natural person. A natural person exists as a physical fact, and he resides somewhere. His energy is exerted at some certain place and the fact that as a result of his efforts put forth in the City of Chicago, he makes money in Oklahoma, gives no right to Oklahoma to tax the results of his energy and judgment.

The cases holding that a state may tax a corporation within the state in the proportion that its

property within the state bears to its entire assets are cases where the corporations are railroads, express companies, or other companies, exercising some peculiar franchise of value not necessarily governed by the amount of physical assets and where the business done in one state affected and had relation to the business done in all the states where the corporation was engaged in business. *Adams Express Company* v. *Auditor,* 166 U. S. 185, 41 L. ed. 965. But the appellant in this case is not exercising a franchise. His property is worth just what the physical assets are worth. The business done in Oklahoma is not one penny more valuable by reason of business in other states. Appellant is not a corporation. His energy and ability and judgment are not mere conceptions of the law prevading his entire business, as the management of a corporation is supposed to be in and of its business wherever conducted. His activity is localized. The State of Oklahoma cannot tax it.

Proposition III.

The provisions of the statute attempting to create a lien on all of appellant's property in Oklahoma to secure payment of the income tax are void and create no lien.

Section 11 of Chapter 164 of Oklahoma Session Laws of 1915, is as follows:

"If any of the taxes herein levied become delinquent, they shall become a lien on all the property, personal and real, of such delinquent person, and shall be subject to the same penalties and provisions as are all advalorem taxes."

Appellant's income is not in Oklahoma and never was here. The state seeks to collect the tax from property belonging to appellant that is in the state. The amended bill challenges the right of the state to do this, for the reason that it deprives appellant of his property without due process of law.

The provision quoted above, making the tax a lien on all of appellant's property deprives him of his property without due process of law.

The plaintiff lives outside of the state. This tax is levied by an Act of the Legislature. The plaintiff, of course, did not appear before the Legislature and had no opportunity to be heard before the tax was levied and assessed. Under no view of the case can the Act of the Oklahoma Legislature create a personal liability against a non-resident. The only jurisdiction it could possibly have would be against the property taxed. The property taxed here is the income of the plaintiff which, as we have shown, is something separate, independent and apart from any other property. Then the State of Oklahoma cannot enforce this tax against other property belonging to the plaintiff, than that against

which the tax is assessed. It has no right to a personal judgment against him. *Its right to tax the property of a non-resident being one simply in rem against the property taxed, it cannot fix a lien upon other property though it may belona to the same person.* This doctrine is sustained by *Dewey* v. *City of Des Moines*, 173 U. S. 193, 43 L. ed. 665. In that case the court said:

> "It is asserted in the petition that the defendant, Dillworth, the treasurer of Holt County, is attempting to enforce the assessment levied by the common council, and that he claims plaintiff in error is personally liable for the taxes and interest, and will enforce payment thereof unless restrained, and that plaintiff's personal property is liable to be illegally seized for the payment of the tax. These allegations are substantially admitted by the answers of the defendants, except as to the illegality of the possible seizure of plaintiff's personal property. By filing the counter-claim the contractor makes a direct attempt to enforce, not only the lien upon the lots, but the personal liability of the lot owner. Thus a nonresident, simply because he was the owner of property on a street in a city in the State of Iowa, finds himself by the provisions of the state statute, and without the service of any process upon him, laid under a personal obligation to pay a tax assessed by the common council or by the board of public works and city engineer under the statute, upon his property abutting upon the street, for the

purpose of paying the expenses incurred in paving the street, which expenses are greater than the benefit the lots have received by virtue of the improvement. The plaintiff, prior to the imposition of that assessment, had never submitted himself to the jurisdiction of the State of Iowa, and the only jurisdiction that state had in the assessment proceedings was over the real property belonging to him and abutting on the street to be improved. An assessment upon lots for a local improvement is in the nature of a judgment.

"It is said that the statute (Code of Iowa, Sec. 478) provides for the personal liability of the owner of lots in a city in the State of Iowa, to pay the whole tax or assessment levied to pay the cost of a local improvement, and that the same statute provides that the assessment shall also be a lien upon the respective lots from the time of the assessment. It is also said that the statute has been held to be valid by the Iowa Supreme Court. This seems to be true. *City of Burlington* v. *Quick,* 47 Iowa 222, 226; *Farwell* v. *The Des Moines Brick Manufacturing Company et al.,* 97 Iowa 286 (35 L. R. A. 63). The same thing is also held in the opinion of the state court delivered in the case now before us.

"In this case no question arises with regard to the validity of a personal judgment like the one herein against a resident of the State of Iowa, and we therefore express no opinion upon that subject. This plaintiff was at all times a non-resident of that state, and we think that a

statute authorizing an assessment to be levied upon property for a local improvement, and imposing upon the lot-owner, who is a non-resident of the state, a personal liability to pay such assessment, is a statute, which the state has no power to enact, and which cannot, therefore, furnish any foundation for a personal claim against such non-resident. There is no course of reasoning as to the character of an assessment upon lots for a local improvement, by which it can be shown that any jurisdiction to collect the assessment personally from a non-resident can exist. The state may provide for the sale of the property upon which the assessment is laid, but it cannot under any guise or pretense proceed farther, and impose a personal liability upon a non-resident to pay the assessment or any part of it. To enforce an assessment of such a nature against a non-resident, so far as his personal liability is concerned, would amount to the taking of property without due process of law, and would be in violation of the Federal Constitution.

"In this proceeding the lot-owner to have the assessment set aside and the statutory liability of plaintiff adjudged invalid, the court was not justified and dismissing the petition and giving the contractor, not only judgment on his counterclaim foreclosing his lien, but also inserting in that judgment a provision for a personal liability against the plaintiff and for a general execution against him. Such a provision against a non-resident, although a litigant in the courts of the state, was not only errone-

ous, but it was so far erroneous as to constitute, if enforced, a violation of the Federal Constitution for the reason already mentioned. By resorting to the state court to obtain relief from the assessment and from any personal liability provided for by the statute, the plaintiff did not thereby in any manner consent, or render himself liable, to a judgment against him providing for any personal liability. Nor did the counterclaim made by the defendant contractor give any such authority.

"The principle which renders void a statute providing for the personal liability of a non-resident to pay a tax of this nature is the same which prevents a state from taking jurisdiction through its courts, by virtue of any statute, over a non-resident not served with process within the state, to enforce a mere personal liability, and where no property of the non-resident has been seized or brought under the control of the court. This principle has been frequently decided in this court. One of the leading cases is *Pennoyer* v. *Neff*, 95 U. S. 714 (24: 565), and many other cases therein cited. *Mexison Central Railway Company* v. *Pinkney*, 149 U. S. 194, 209 (37: 699, 705).

"The lot-owner never voluntarily or otherwise appeared in any of the proceedings leading up to the levying of the assessment. He gave no consent which amounted to an acknowledgment of the jurisdiction of the city or common council over his person.

"A judgment without personal service against a non-resident is only good so far as

> it affects the property which is taken or brought under the control of the court or other tribunal in an ordinary action to enforce a personal liability, and no jurisdiction is thereby acquired over the person of a non-resident further than respects the property so taken. This is as true in the case of an assessment against a non-resident, of such a nature as this one, as in the case of a more formal judgment."

In the *City of New York* v. *McLean*, 63 N. E. 380, the second paragraph of the syllabus is as follows:

> "In an action against a non-resident stockholder to recover for an unpaid assessment on national bank stock, personal service was had within the state. *Held*, not to render him personally liable on such judgment."

The gist of this decision was that an assessment for taxes against a non-resident created no personal liability and no judgment could be rendered against him for the amount of the taxes even though in an action subsequently brought to recover same, personal service was obtained upon him. In other words, the assessment was void as to him and did not carry any liability that could be enforced by action, even though personal service was obtained. Applying that doctrine in this case it is clear that there is no personal liability on the part of the plaintiff to the State of Oklahoma. The statute trying

to make the income tax a lien upon property, other than the income itself, is the same thing in effect as attempting to levy an execution upon property belonging to him, not subject to taxation. The state cannot do this. Besides, the statute attempts to make it a lien upon all his property in the state, without discriminating between income and non-income producing property. The state could not sue him and obtain a personal judgment, and not being able to do this, it could not lay its hands upon any property except that sought to be taxed.

Judge STONE disposes of this question in one paragraph (Rec., p. 24) in these words:

> "The provisions of the law creating a tax lien upon all property in the state is not subject to attack. It does not pretend to create a personal liability, and the lien is no broader than the tax which is based upon the income from all property, business, etc., in the state. Note *Scholey* v. *Rew,* 23 Wall. 331, for statute with similar provision."

We have endeavored to show the difference in the power of the National Government over foreigners and that of a state over citizens of the United States residing in another state. We want now to call the attention of the court to the difference in the statute before the court in *Scholey* v. *Rew* and the statute here. In *Scholey* v. *Rew,* the United

States had enacted a law subjecting to the right to inherit property to an excise tax. The statute placed a lien on the very subject taxed. The right to inherit the land was taxed and a lien was fixed on the land to secure its payment. The right to inherit the land was the devisee's title to the land. He had no title without the right to inheritance and the statute merely fixed a lien on what he received by the inheritance, to secure the payment of taxes on his right thereto. In this case the income was received long before the tax became due. The subject taxed is the income. The statute attempts to fix a lien on other property and that without regard to whether it produces an income or not.

There is no direct proof in the record as to whether all of appellant's property in Oklahoma produces income. We do not know what the presumption of law is. We do not believe this court will presume that all of appellant's property in Oklahoma is producing. The court will probably consider from the whole record in this case that appellant owns property in different parts of Oklahoma, some of which is producing oil and gas and some not. *The fact that the statute undertakes to make the income tax a lien on all property owned by the person against whom the tax is assessed is another indication that the tax is directed against the person receiving the income and not against property*

or privilege. If the Legislature had considered the tax a tax on the privilege of engaging in business, it would have made it a lien on the business or the specific property producing an income.

If our theory concurred in by the Attorney General of Oklahoma, that an income is a taxable entity, regardless of the source from which it springs, then there is no lien on any other property except the income itself, to secure the payment thereof.

DIVISION B.

We do not admit that the tax in question here is a privilege tax. We think we have demonstrated that it is not, but if it shall be held to be a privilege tax, then we say it is illegally levied.

PROPOSITION I.

If the tax is held to be a privilege tax the payment by appellant of the gross production tax required by Chapter 39 of the Session Laws of 1916 relieves him from liability. That chapter repeals the income tax law so far as the income is derived from the production of oil and gas.

We have undertaken to show that appellant's income is entirely separate from his tangible property, and that the Oklahoma Constitution and Statutes classify and treat incomes as separate entities

for the purpose of taxation, and the income tax as a generic form of tax. We do not concede that the income tax attempted to be laid on non-residents is a privilege tax. The income tax laid on residents is certainly not a privilege tax in the sense privilege is usually understood, and the statute says "a like tax shall be levied, assessed and collected and paid annually upon the entire net income from all property owned, and of every business, trade or profession carried on in this state by persons residing elsewhere." If it is a like tax, it is a tax on incomes as such and not on privileges. The state grants appellant no privilege. But if the income tax as regards non-residents is held to be a tax on property or privilege, then the payment of the gross production tax relieves from the payment thereof. Judge STONE said in his opinion in the lower court (Rec., p. 19):

> "A tax upon an income of the instant character (from a business), is directed at neither the person who receives, nor the property from which the income arises, but at the privilege of making, producing, creating, receiving and enjoying the income itself. The right to lay such tax depends upon the protection of the person who receives or of the business which helps create that income."

The Oklahoma Income Tax Law was passed in 1915. The Gross Production Tax Law, as amended,

went into effect February 14th, 1916. The portion of the first section of the gross production law, material to the question involved here is as follows (Chap. 39, Session Laws of Okla., 1916):

> "Every person, firm, association or corporation engaged in the mining or production within this state of asphalt or of ores bearing lead, zinc, jack, gold, silver, or copper, or of petroleum or other crude oil or other mineral oil or of natural gas, shall within thirty days after the expiration of the quarter-annual period ending on the last day of March, A. D. 1916, and of each quarter annual period thereafter, expiring respectively, on the last day of June, September, December and March of each year, file with the state auditor, a statement under oath, on forms prescribed by him showing the location of each mine or oil or gas well operated by such person, firm, corporation or association during the last preceding quarter-annual period; the kind of such mineral, oil or gas produced; the gross amount thereof produced, an the actual cash value thereof at the place of production; the amount of the royalty payable thereon, if any, to whom payable and whether it is claimed that such royalty is exempt from taxation by law, and the facts on which such claim of exemption, if any, is based; and such other information pertaining thereto as the state auditor may require, and shall at the same time pay to the state auditor a tax equal to one-half of one per centum of the gross value of asphalt and of ores bearing lead, zinc, jack,

gold, silver and copper produced, less the royalty interest, and equal to three per centum of the gross value of the production of petroleum or other crude or mineral oil and of natural gas, less the royalty interest. The owner of any royalty interest shall pay to the state auditor the tax herein imposed upon such royalty interest within the time and in the manner provided by this act. * * *

"The payment of the taxes herein imposed shall be in full and in lieu of all taxes by the state, counties, cities, towns, townships, school districts and other municipalities upon any property rights attached to or inherent in the right to said minerals, upon leases for the mining of asphalt and ores bearing lead, zinc, jack, gold, silver or copper or for petroleum or other crude oil or other mineral oil or for natural gas upon the mining rights and privileges for the minerals aforesaid belonging or appertaining to land, upon the machinery, appliances and equipment used in and around any well producing petroleum or other crude or mineral oil or natural gas, or any mine producing asphalt, or any of the mineral ores aforesaid and actually used in the operation of such well or mine; and also upon the oil, gas, asphalt or ores bearing minerals hereinbefore mentioned during the tax year in which the same is produced, and upon any investment in any of the leases, rights, privileges, minerals or property hereinbefore in this paragraph mentioned or described; but any interest in the land other than that herein enumerated, and oil in storage, asphalt, and ores

bearing the minerals hereinbefore named, mined, produced, and on hand at the date as of which property is assessed for general and ad valorem taxation for any subsequent tax year shall be assessed and taxed within the taxing district in which such property is situated at the time."

Undoubtedly there should be a semi-colon between the word "gas" at the end of the ninth line and the word "upon" at the beginning of the tenth line of the last paragraph quoted.

It may be urged that as the 1916 Gross Production Tax Act amends a former act, the Act of 1915 (Sub-division A, Section 1 of Chapter 107), it is not a new tax and does not affect the Income Tax Law. But an examination of the Gross Production Tax Law of 1915, and the law of 1916, shows that the Gross Production Law of 1916 is more extensive in its scope. The 1916 law is set out above. The 1915 act so far as it shows the property which it relieves from other taxation is as follows:

> "For the purpose of estimating the value of any property rights attached to or inherent in the right to mineral in this state after the same is segregated from the ore in place, and in lieu of any other method of taxing the same and in lieu of any other taxes that might be levied and collected upon an ad valorem basis upon the equipment and machinery in and around any well producing natural gas or petroleum or oth-

> er mineral oil and used in actual operation of such producing well from which a gross production tax is collected as herein provided (but oil or other mineral, if on hand for more than thirty days at tax rendering period, shall be taxed ad valorem in the taxing district where situated), every person, firm, association or corporation engaged in mining or production within this state, of asphalt, or of ores bearing lead, zinc, jack, gold, silver, copper or petroleum or other mineral oil, or of natural gas, shall within thirty days after the expiration of each quarter, annual period * * * file with the state auditor a statement, under oath, on forms prescribed by him, showing the location of each mine * * * and shall at the same (time) pay to the state auditor gross production tax equal to one-half of one per centum of the gross value of ores produced therefrom bearing lead * * * two per centum of the gross value of the production of petroleum," etc.

It will be observed that the payment of the tax provided for under the 1916 law, is in full and in lieu of all taxes by the state or any of its sub-divisions upon any property rights attached to or inherent in the right to said minerals upon leases for the mining of asphalt and ores bearing lead, zinc, jack, gold, silver, or copper or for petroleum or other crude oil or other mineral oil or for natural gas, upon the mining rights and privileges for the minerals aforesaid belonging or appertaining to

land, etc. The 1916 act enlarges the field so that the payment of the tax therein provided for relieves from taxation subjects of taxation not relieved under the Act of 1915. At the same time the Act of 1916 raises the rate of the tax.

It seems clear that if the income tax is a property tax or a privilege tax, the gross production tax is substituted therefor. The Gross Production Tax Law in effect repeals the income tax law so far as the income is derived from oil and gas. The gross production tax is in full and in lieu of all taxes by the state, counties, cities, etc., upon any *property rights* attached to or inherent in the right to said minerals, upon leases for the mining of asphalt and ores bearing lead, zinc, jack, gold, silver or copper or for petroleum or other crude oil or other mineral oil or for natural gas upon the *mining rights and privileges* for the minerals aforesaid belonging or appertaining to land, etc. The amended bill of complaint alleges that appellant's entire income from Oklahoma is derived from the production of oil and gas.

The record shows that appellant has paid the gross production tax. It amounted to more than One Hundred Thousand ($100,000.00) Dollars. Now if the income tax against non-residents is a privilege tax, the payment of the gross production tax relieves from its payment. The gross production tax is in

lieu of all taxes upon property rights and upon mining rights and privileges. If the tax on the privilege of mining is paid, it cannot be taxed again. It will not do to say that the privilege of mining is one thing and the privilege of making money by the operation is another. When appellant has paid for the privilege of mining, he has paid for the privilege of mining at a profit.

We do not say that counsel for the State of Oklahoma would take a different position as to the nature of the income tax, even if there was no gross production tax statutes. We believe the Attorney General and his able assistants would still admit that an income for the purposes of taxation under the Oklahoma law is a separate entity different from property or privileges. But the Oklahoma Gross Production Tax Statute would force them to take that position even though they would otherwise be inclined to take a different one.

Judge Stone says in his opinion (Rec., p. 17) that "the petition raises a point that the later Gross Production Tax Law of the state had displaced the income tax law insofar as incomes from oil properties. This point was not pressed at the hearing and, presuming it abandoned, we pass it by."

We referred to this point at the hearing below but did not argue it to any extent and did not brief

it at all, but our failure to argue and brief it was not because we had abandoned it, but partly because the Attorney General agreed with us that the income as a subject for taxation was a separate entity, a distinct subject of taxation and did not urge that the tax was a privilege tax; and partly because our time was entirely inadequate for oral argument and we were only allowed five days after the argument in which to file typewritten brief. We quoted from the typewritten brief of the Attorney General near the beginning of this argument to show that he does agree with us as to what an income tax is. We presumed the lower court would accept the agreement of opposing counsel as to the nature of this tax, but Judge Stone did not fully accept our agreement as to what the income tax is, and says that it is a tax on a privilege to make an income.

We think even if the tax is on a privilege at all, Judge Stone is inaccurate in his use of language, when he says the tax is on the privilege to make, produce, create, receive and enjoy an income. If the State of Oklahoma is granting privileges to make and enjoy incomes, she can readily find plenty of people who will pay for the privilege. Many of us would cheerfully pay for the privilege. But unfortunately the state cannot grant such privilege. She can grant a privilege to engage in business, but she can not grant a privilege to make an income.

We think Judge STONE meant to say that the state could tax the privilege to engage in the business from which the income was derived. If the tax is on the privilege to engage in business, then the payment of the gross production tax relieves him from further tax on the privilege. The gross production tax of Oklahoma is like the Wisconsin tax on insurance companies, which this court had before it for consideration in *Northwestern Insurance Co.* v. *Wisconsin,* decided May 20th, 1918. It is not only a tax on the property from which oil is produced but it is a commutation tax in place of all other taxes upon property and privilege.

The matter of the gross production tax should also be considered in connection with the lien claimed by the state on appellant's property. The most valuable property of the appellant in this state is of course his producing oil and gas leases. He has paid the gross production tax on them. Is it not clear from the reading of the Gross Production Tax Statute that the Legislature intended that the payment of the gross production tax should discharge property producing oil and gas from the payment, directly or indirectly of any other taxes? The Legislature never intended that after the gross production tax had been paid, a lien should be attached to the same property for the collection of another tax.

The proposition that the payment of the gross production tax discharges the appellant is not necessarily a federal question, but this court has the right to pass upon it.

—*Siler* v. *Louisville & N. R. Co.*, 213 U. S. 175, 53 L. ed. 753;

Ohio Tax Cases, 232 U. S. 576, 58 L. ed. 737;

Louisville & N. R. Co. v. *Greene*, 244 U. S. 522.

PROPOSITION II.

If the tax is a privilege tax and not discharged by the payment of the gross production tax, it is void because it deprives this appellant of privileges and immunities enjoyed by citizens of Oklahoma; because it denies him the equal protection of the laws and because it takes his property without due process of law.

The Fourteenth Amendment prevents a state from discriminating in matters of taxation. In *County of Santa Clara* v. *Southern Pac. R. Co.*, 18 Fed. 385, the court said:

> "The first section of the Fourteenth Amendment places a limit upon all the power of the state, including among others, that of taxation."

Again the opinion reads (p. 399):

> "Unequal taxation, so far as it can be prevented, is, therefore, with other unequal burdens, prohibited by the amendment. There undoubtedly are, and always will be more or less inequalities in the operation of all general legislation arising from the different conditions of persons, from their means, business, or position in life, against which no foresight can guard. But this is a very different thing, both in purpose and effect, from a carefully devised scheme to produce such inequality; or a scheme, if not so devised, necessarily producing that result. Absolute equality may be attainable, but gross and designed departures from it will necessarily bring the legislation authorizing it, within the prohibition. The amendment is aimed against the perpetration of injustice, and the exercise of arbitrary power to that end."

Further in the opinion (p. 409) the court said:

> "The ground of complaint is not that any different rate of taxes is adopted, for there is none—but that a different rule is followed in ascertaining the value of the property of railroad corporations, as a basis for taxation, from that followed in ascertaining the value of property held by natural persons. In estimating the value in one case, certain elements are considered, by which the value as a basis for taxation is lessened, in estimating the value in another case, those elements are omitted, by which the value is proportionally increased."

It is true that this was an opinion rendered at Circuit, but the opinion was written by STEPHEN J. FIELD, who was at that time a justice of this court.

The first sentence of the 2nd section of Article 4 of the Constitution of the United States is as follows:

> "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

This provision of the Constitution has been construed by this court.

In the *Slaughter House Cases*, 83 U. S. (16 Wall.) 36, 21 L. ed. 394, Mr. Justice MILLER, said of this provision:

> "Its sole purpose was to declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, *neither more nor less*, shall be the measure of the rights of citizens of other states within your jurisdiction." (Italics ours.)

This quotation is at page 409 of 21 L. ed. We regret not to be able to give the page of the official.

In *Ward* v. *Maryland*, 12 Wall. 418, 20 L. ed. 449, the court said:

> "Attempt will not be made to define the words 'privileges and immunities,' or to specify

the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the court. Beyond doubt those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the Union for the purpose of engaging in lawful commerce, trade or business, without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the state; and to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens. Cooley, Const. Lim., 16; *Brown* v. *Maryland*, 12 Wheat. 449."

See also:

Paul v. *Virginia*, 8 Wall. 180, 19 L. ed. 350;
Crandall v. *Nevada*, 6 Wall. 35, 18 L. ed. 45;
Oliver v. *Washington Mills*, (11 Allen) 93 Mass. 268.

In urging these propositions, we do not want to be understood as waiving any of the grounds we have taken as a reason for defeating this tax; but even though none of the reasons hereinbefore urged were good we believe that these provisions of the Constitution of the United States would prevent the State of Oklahoma from levying this tax. If the tax be considered as an income tax proper—that is, as a separate entity, distinct from the business or property from which the income is derived—then it is in-

valid because it discriminates against non-residents. *The income tax law of Oklahoma permits residents to deduct from their gross income, not only losses within the State of Oklahoma, but also losses from business or losses in any other way, sustained outside of the State of Oklahoma.* The statute does not permit non-residents to deduct their losses from their business outside of the state, from their profits on business carried on inside of the state. It is argued by the Attorney General that there is no express discrimination between residents and non-residents of Oklahoma in this law. If the practical effect of the act is to create a discrimination, it makes no difference whether the law expressed an intention to so discriminate or not. The practical result is the same. *County of Santa Clara* v. *Southern Pacific R. Co.*, 18 Fed. 385. This is not a mere academic question and it is a condition not unlikely to arise that a person engaged in business in other states would sustain losses in some other state than Oklahoma. If he happened to reside in Oklahoma, the state would permit him to deduct these losses from his income in computing the tax, while if he resided in some other state he would not be permitted to make the deduction. In estimating the value of income in one case certain elements are considered by which the value is lessened, while in the other these elements are omitted and the value thereby increased.

There are cases that hold that the practical effect of statutes will be looked to and that because a thing could happen under a statute will not affect the constitutionality or validity of the statute unless it is shown that the inconvenience that might be occasioned has actually happened or is likely to happen, though there are other cases that hold that what may result from the operation of the statute must be considered whether there is proof that it has happened or is about to happen. The rule, of course, is that a party must be of the *class* discriminated against before he can raise the question of discrimination, *but the appellant is in the class.* He cannot be compelled to pay the taxes every year until he can show that *he* is losing money outside of the state. *The statute discriminates against non-residents as a class and appellant is of that class.* The validity of the statute so far as it affects non-residents cannot be made a question of fact in each case depending on whether the party is losing money outside of the state.

In this case the affidavit of appellant shows that he lost money in several states outside of Oklahoma. He did not lose money on his entire business outside of Oklahoma but he did lose in s e v e r a l states. It could well happen that a non-resident could lose money in all of his business outside of the State of Oklahoma and still make money in that state. Appel-

lant's affidavit shows that such a thing is likely to happen.

The case of *Travelers' Insurance Company v. Connecticut*, 185 U. S. 364, 46 L. ed. 949, referred to by counsel for the State of Oklahoma in their brief in the trial court is not in point. The tax in that case laid against non-resident stockholders was by an entirely different statute and for a different purpose. While the resident stockholders paid taxes to the municipality in which they resided, it was shown in that case that the resident in fact paid a higher tax than the non-resident. It is true that absolute equality in the levying, assessment and collection of taxes cannot be obtained, *but the point we make is that some other basis for inequality must exist, than merely the fact that one of the persons subject to the tax lives outside the state, while the other lives inside.*

If the tax involved in this case be considered as a privilege tax, then it is still subject to the inhibition of Section 2 of Article 4, because there is no privilege tax whatever laid upon residents of the State of Oklahoma. The income tax law provides that each and every person in this state shall be liable to an annual tax upon the entire net income of such person, arising or accruing from all sources during the preceding calendar year. The subsequent sections of the statute permit the resident tax payer to deduct

losses from all sources from his gross income in making up the amount of income that is taxable. It is clear from the reading of these sections that the tax levied upon *residents* of Oklahoma is not a privilege tax. It is an income tax pure and simple. It has no relation to business or occupation as such. A bishop would have to pay the tax the same as any one else, if his salary was large enough. There was no intention to tax privilege so far as residents are concerned. If the resident had no business at all in Oklahoma and no income from any property in Oklahoma, the state would have jurisdiction to require him to pay on his entire income (see *Fidelity & Columbia Trust Co.* v. *Louisville*, decided Nov. 5, 1917, not yet reported in bound volume), and he would still be required to pay an income tax to the state upon his entire income. It cannot, therefore, be construed as a privilege tax as to him. The State of Oklahoma cannot tax even one of its own citizens for the privilege of engaging in business in other states, or of holding property in another state and has not attempted to do so. The tax upon the resident is certainly an income tax in the true sense of the word. Then there is no privilege tax upon the resident of the state. The state cannot impose a privilege tax upon a non-resident when it has not imposed one upon a resident. If the tax upon the non-resident is to be construed as a privilege tax, then it is invalid

because no such tax is levied upon its citizens, and the non-resident is thereby deprived of "privileges and immunities" given or permitted to citizens of Oklahoma.

It seems to us that this question is controlled by the *Slaughter House Cases*, 16 Wall. 36; *Ward* v. *Maryland*, 12 Wall. 418, and *Southern R. Co.* v. *Greene*, 216 U. S. 400, in which the court said that "equal protection of the laws means subjection to equal laws applying alike to all in the same situation." In the course of the opinion, the court said:

> "It remains to consider the argument made on behalf of the State of Alabama, that the statute is justified as an exercise of the right of classification of the subjects of taxation, which has been held to be entirely consistent with the equal protection of the laws guaranteed by the Fourteenth Amendment. It is argued that the imposition of special taxes upon foreign corporations for the privilege of doing business within the state is sufficient to justify such different taxation, because the tax imposed is different, in that the one imposed on the domestic corporation is for the privilege of being a corporation, whereas the one on the foreign corporation is for the privilege of such corporation to do business within the state. While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such

classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification. *Gulf, Colorado & Santa Fe Ry.* v. *Ellis,* 165 U. S. 150, 155, 165; *Cotting* v. *Kansas City Stock Yards Co.,* 183 U. S. 79; *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540, 559.

"It is averred in the complaint, and must be taken as admitted, that there are other corporations of domestic character in Alabama carrying on the railroad business in precisely the same way as the plaintiff. It would be a fanciful distinction to say that there is any real difference in the burden imposed because the one is taxed for the privilege of a foreign corporation to do business in the state and another for the right to be a corporation. *The fact is that both corporations do the same business in character and kind, and under the statute in question a foreign corporation may be taxed many thousand of dollars for the privilege of doing, within the state, exactly the same business as the domestic corporation is permitted to do by a tax upon its privilege, amounting to only a few hundred dollars.* We hold, therefore, that to tax the foreign corporation for carrying on business under the circumstances shown, by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws, and the plaintiff being in position to invoke the protection of the Fourteenth Amendment, that such attempted taxation under a statute of the state, does vio-

lence to the F e d e r a l Constitution." (Italics ours.)

At the hearing below the Attorney General took the position that there was no discrimination. He admitted that a non-resident got no deductions for losses outside of the state, but took the position that that did not affect he validity of the Act. He gave as a further argument against any discrimination in the statute, that appellant had claimed personal exemptions on account of his wife and children. It is true that appellant's report of his income made such claim and that it was allowed. But is the allowance of personal and family exemptions within the purview of Oklahoma law? The fact that the Auditor of the state allowed the exemption and that the Attorney General considers the allowance a proper one is the strongest sort of proof that the tax is personal and not a privilege tax.

It may be argued that the result is fair although the non-resident is taxed on privilege and the resident on income. But if the result will be that the resident is given an advantage over the non-resident the argument fails. If the resident can deduct losses outside of the state while the non-resident is not permitted to do so there is discrimination. The resident is permitted by Section 6 to deduct all interest paid within the year. If the tax against the non-resident is a tax directed against a privilege rather than

against a person, the non-resident cannot deduct in terest paid by him from his income derived from bus iness in the state. The resident can deduct debt charged off during the year but the non-resident can not. The law discriminates against the non-residen

Aside from the question of discrimination ther is no privilege granted appellant that the state ha the right to tax. This question is related to the gros production tax proposition hereinbefore presentec The gross production tax has been paid for the priv ilege of engaging in the oil business. What othe privilege is enjoyed? Appellant is not a corporatio He has no franchise of that kind. He has paid fo the privilege of producing oil. Surely it cannot b that the state can tax him once for the privilege o producing oil, and again for the privilege of makin money out of the oil. Under the gross productio tax law, the producer must pay the tax on the o produced, regardless of whether he makes a prof out of the business. The state cannot collect such tax, and then if he makes a profit again tax th profit as a privilege tax.

There must be a subject-matter upon which a ta can be laid before it can be laid. Here there is n subject-matter to uphold the tax as a *privilege* u less the court shall hold that there are two distin privileges in every business, one to run the busine and another to make money out of it.

It seems to us that this disposes of the question so far as the tax being one on privilege is concerned.

But we take the further position that the state cannot impose a tax on the business of natural persons such as the oil business proportioned by the profit made out of the business. Section 12 of Article 10 provides for various kinds of taxation. The only species provided for there that can be construed as privilege taxes are license and franchise. The right to produce oil is neither a franchise (19 Cyc. 1451) nor the subject of a license. *Gross revenue taxes* while in effect excise taxes in their nature cannot be levied in proportion to *profits.*

An excise tax on the business of a natural person, the business being lawful, not the subject of license nor exercised through a franchise cannot be graduated in proportion to the net profits. In taking this position we have not overlooked *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, which holds that an excise tax may be laid on a corporation in proportion to the amount of its net income; nor *Magoun* v. *Illinois Trust & Sav. Bank,* 170 U. S. 283, which holds that a state may graduate inheritance taxes.

In *Flint* v. *Stone Tracy Co.,* the tax was on the right to exercise a corporate franchise. It was not on the business as such, considered apart from the franchise by virtue of which it was carried on. In

Magoun v. *Illinois Trust & Sav. Bank,* it was in effect held that as the inheritance was by grace of the state, the state could impose what conditions it pleased and classify the amounts inherited for the purpose of taxing the different amounts at different rates.

But a natural person engaged in a business not exercised through a franchise is in a different position. The amount of the net income is not necessarily related to the volume of the business. Two concerns may have the same investment and the same volume of business, and yet one may actually lose money while the other may make a large net profit. The state has given both the same opportunity and the same protection. Such a tax is not a tax on the business. It is a tax on making money. Admitting that an excise tax can be laid on business as such its levy cannot be conditioned on whether or not the business makes money. *A tax is so much taken from the owner of the subject taxed.* When money is taken from a man simply because he makes it, it ceases to be a privilege tax.

If a graduated excise tax can be laid on business as such the amount of tax that a business pays could be five times as much on a business making ten thouand dollars as on one making five thousand. There is no reason in common justice for such a distinction. It may be argued that the income tax on

individuals is based on the same principle. But not necessarily. A man may be engaged in two or three distinct lines of business in each of which he makes five thousand dollars net per annum, while his neighbor devoting all his energy to one business made a net profit of fifteen thousand in that one. If the tax can be graduated, the man with one business could be required to pay much more than the other man though they both receive the same protection. To justify graduation of an excise tax, the state must grant more of a privilege than merely to engage in an ordinary lawful business.

In the *License Tax Cases*, 5 Wall. 462, 18 L. ed. 497, the court said:

> "There are, undoubtedly, fundamental principles of morality and justice which no Legislature is at liberty to disregard."

The force of this language is in no way impaired by the remainder of the sentence which is:

> "* * * but it is equally undoubted that no court, except in the clearest cases, can properly impute the disregard of those principles to the Legislature."

It is not necessary in this case to impute any such motive to the Legislature, because the Oklahoma Constitution does not give the Legislature the power to graduate excise taxes and the entire contents of Chapter 164 of Oklahoma Session Laws of 1915,

shows that the Legislature did not intend to lay a franchise, license or excise tax on business, but an income tax pure and simple. A graduated tax on the net income from a business of a natural person would be wanting in due process of law, and an arbitrary exercise of the powers of Government forbidden by the Constitution of the United States and opposed to the spirit of our Governments, state and national, and to the genius of the American people.

Very few people find fault with an income tax proper, but surely when we tax the individual in increased proportion as his income increases, we have done enough in the way of graduating taxes. There are two reasons for graduating income taxes. The first is that the tax should be increased, or in other words, proportioned to the ability to pay. The second reason, more often thought than openly expressed, is that the graduated tax tends to level things up and bring the big fellow down towards the little one. But if these reasons are sufficient for the income tax on individuals they certainly cannot be sufficient for graduating taxes on business or property. There can be no excuse for departing in the sense of ordinary business or property, from the rule that taxes should be paid for the protection afforded the subject taxed by the state or government.

Finally if it should be held that the tax is an excise tax on the right to engage in the oil business,

that the state could levy a graduated excise tax on the business, though levying none on her own citizens, the question again comes back to the nature of the business. Appellant has paid the gross production tax which covers his right to produce the oil. The record shows that he manages his business as an entire business. The course of the business is for him to take leases in Oklahoma, buy the supplies necessary to operate them outside of the state, sell the oil outside of the state, collect the money outside of the state and manage the business from his office outside of the state. The state cannot collect an excise tax on a business such as appellant conducts because it is not in the state. A large part of it is outside of the state. Practically all of it except the production of the oil. A great part of the net profit is unquestionably earned outside of the state. There is no way to divide the profits between Oklahoma and Chicago and Oklahoma has not attempted to formulate a plan. Under any view this tax must fall.

—*Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1, 30.

Proposition III.

If the Tax Is a Privilege or Excise Tax It Is Void Because It Lays a Burden on Interstate Commerce.

If the tax in question is held to be an excise tax on the business, then it is a burden on interstate

commerce. The oil is mined here and shipped to buyers outside of the state under contracts made out of the state, and the money is paid out of the state. It is interstate commerce. The case of *Crew Levick Company* v. *Pennsylvania*, 245 U. S. 292, and cases cited in that case, govern this one. In that case the court quoted from *Postal Tel. Cable Co.* v. *Adams*, 155 U. S. 688, 695, 39 L. ed. 311, 315, as follows:

> "It is settled that there, by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a state on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained."

The record in this case shows that the business of appellant is interstate commerce. The directing head of the business is in Illinois. The books are kept there. The contracts are made there. The oil is sold to non-residents and they pay for it outside of the state. A great portion of the oil is shipped out of the state to the non-resident purchasers in its crude form. The state cannot lay an excise tax on such a business. *Minnesota Rate Cases*, 230 U. S. 352; *Kansas City R. Co.* v. *Kansas*, 240 U. S. 227; *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1.
National Paper Co. v. Commonwealth of Mass. 246 U.S. 135; Looney v. Crane Co. 245 U.S. 178.
If the tax is considered an excise tax on business,

rather than an income tax proper, it is not governed by *United States Glue Co.* v. *Oak Creek*, decided by this court June 3rd, 1918, nor by *Peck* v. *Lowe*, decided May 20th, 1918. Those cases treated the tax as an ordinary income tax, laid on the income of a resident after he has received it and is free to do with it as he chooses. But if the tax in controversy here is treated as an excise tax on business, then whether it is measured by gross receipts or net income, it is nevertheless a tax on an interstate business.

APPELLANT HAS NO ADEQUATE REMEDY AT LAW.

On this proposition all the judges below agree. Because they all did agree with us in this regard, we have left the discussion of this question for the conclusion of this brief instead of at the beginning where logically it belongs.

The Judicial Code (Section 267) making statutory what has always been the law, provides that the criterion of equity jurisdiction shall be the absence of a plain, adequate and complete remedy at law.

Appellant has no such remedy in this case. The tax in question in this case was levied by Act of the Legislature. Appellant had no notice or opportunity to be heard before the levy was made. Section

9 of the act authorizes the auditor to revise the returns but does not authorize any appeal from his action. *The Attorney General admits that the income tax law does not authorize any appeal from the action of the auditor.*

Section 10 makes it the duty of the auditor to "issue a warrant such as provided in Section 7392, Revised Laws of Oklahoma, 1910, except that it shall command him to pay the amount collected to the state auditor."

Section 7392, Revised Laws of Oklahoma of 1910, is as follows:

> "Within ten days after taxes on personal property shall become delinquent, under provisions of this article, the county treasurer shall cause a list of the same to be published one time in some newspaper of general circulation, published in the county, giving the name of each person owing delinquent personal taxes, and the amount thereof due within thirty days after such taxes on personal property shall become delinquent under the provisions of this article, the county treasurer shall issue warrants under his hand, directed to the sheriff, commanding such sheriff to levy the amount of such unpaid taxes, and the interest thereon, and the cost of advertising, together with his lawful fees for collecting the same, on chattels belonging to the person to whom such taxes were assessed, and on collecting the same, to pay the amount collected into the county treasury, and

> to make returns of such warrants within sixty days thereafter. The sheriff, on receipt of such a warrant, shall levy the same upon the property of the taxpayer and sell the same in manner and form as provided for the sale of personal property on execution, and shall be entitled to the same fees therefor as are provided by law for like sales on execution. For failure to make such levy or to return this warrant within the time provided by this section, such sheriff shall be subject to the same penalties as provided by law for the failure to levy or return execution."

It is clear that nothing in the income tax act gives the appellant any remedy at law.

But the Attorney General contends that the remedy is found in certain sections of the ad valorem tax law. The ad valorem tax law so far as it affects this question is contained in Chapter 107, Session Laws of Oklahoma of 1915, beginning at page 142. He says our remedy is given by Section 7 of Sub-division B, of Chapter 107 of the Session Laws of 1915 (p. 149). That section is as follows:

> "In all cases where the illegality of the tax is alleged to arise by reason of some action from which the laws provide no appeal, the aggrieved person shall pay the full amount of the taxes at the time and in the manner provided by law, and shall give notice to the officer collecting the taxes showing the grounds of complaint and that suit will be brought against the

officer for recovery of them. It shall be the duty of such collecting officer to hold such taxes separate and apart from all other taxes collected by him, for a period of thirty days and if within such time summons shall be served upon such officer in a suit for recovery of such taxes, the officer shall further hold such taxes until the final determination of such suit. All such suits shall be brought in the court having jurisdiction thereof, and they shall have precedence therein; if, upon final determination of any such suit, the court shall determine that the taxes were illegally collected, as not being due the state, county or sub-division of the county, the court shall render judgment showing the correct and legal amount of taxes due by such person, and shall issue such order in accordance with the court's findings, and if such order shows that the taxes so paid are in excess of the legal and correct amount due, the collecting officer shall pay to such person the excess and shall take his receipt therefor."

This section is contained in the act relating to ad valorem taxes. It is not in Chapter 164 relating to income taxes. Chapter 164 does not attempt to make all the provisions of Chapter 107 applicable to income taxes. Section 7 of Chapter 107 is contained in Sub-division B. That sub-division begins (p. 147) with a statement that limits its provisions to ad valorem taxes. Said sub-division begins as follows:

> "To the existing provisions of law relating to the ad valorem or direct system of taxation, the following provisions are added."

This statement is followed by the sections under that sub-division including Section 7. The application of that section is clearly limited to ad valorem taxes. Section 7 should be read in connection with Section 6 of the same sub-division. That section is as follows:

> "The full amount of the taxes assessed against the property of any such aggrieved person shall be paid at the time and in the manner provided by law; and if at the time such taxes or any part thereof become due, and such appeal is pending, it shall abate and be dismissed upon a showing that such taxes have not been paid. When such taxes are paid, the persons paying the same shall give notice to the officer authorized to collect them that an appeal involving such taxes has been taken and is pending. It shall be the duty of such collecting officer to hold such taxes so paid separate and apart from other taxes collected by him. If upon the final determination of any such appeal, it shall be determined that the taxes were illegally collected as not owing to the state, county or subdivision of the county, the court shall render judgment showing the correct and legal amount of taxes owed by such appellant, and shall issue an order in accordance with the court's findings; and if such order show that the taxes so paid are in excess of the legal and

> correct amount due, the collecting officer shall pay to such person the excess tax, and shall take a receipt therefor."

Section 6 refers to taxes assessed against property. It seems clear when the two sections are read together, that Section 7 is referring to the same sort of taxes that are referred to in Section 6, which are taxes on property and not on income.

In *Thompson* v. *City of Detroit*, 72 N. W. 320, the court said:

> "Section 53, Act No. 206, Pub. Acts 1893, provides, as to the payment of general taxes under protest, that: 'He may pay any tax, whether levied upon personal or real property, under protest to the treasurer, specifying at the same time in writing, signed by him, the grounds of such protest, and such treasurer shall minute the fact of such protest on the tax roll and in the receipt given. The person paying under such protest may within thirty days and not afterwards sue the township for the amount paid, and recover if the tax is shown to be illegal for the reason specified in such protest.' But that act has reference to the assessment and collection of the general taxes, and not to special assessments, as in the present case."

Nothing in Chapter 164 with reference to income taxes refers to any remedy that the taxpayer has except his right to be heard before the auditor. That chapter gives the state remedies but not the

taxpayer. It does not refer to Section 7 of Chapter 107. It would require a wide latitude of construction to hold that the provisions of Section 7 of Chapter 107 governed in the case of income taxes.

Without arguing the question of the *power* of the Oklahoma Legislature to extend the provisions of Chapter 107 to income taxes, by a mere reference we think the presumption is that the Legislature had no such intention. Section 57 of Article 5 of the Constitution of Oklahoma is as follows:

> "Every act of the Legislature shall embrace but one subject, which shall be clearly expressed in its title, except general appropriation bills, general revenue bills, and bills adopting a code, digest, or revision of statutes; and no law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only; but so much thereof as is revived, amended, extended, or conferred shall be re-enacted and published at length: *Provided,* That if any subject be embraced in any act contrary to the provisions of this section, such act shall be void only as to so much of the law as may not be expressed in the title thereof."

Chapter 164 does not seem to us to extend or to attempt to extend the provisions of Chapter 107 to income taxes. In view of the Constitutional provision just quoted that no law shall be revived, amended, or the provisions thereof extended or conferred,

by reference to its title only, the intention to apply the provisions of Section 7 of Sub-divsion B, of Chapter 107 to the income tax, should not be presumed even if it could by a labored construction be held that the Legislature could so extend its provisions without re-enacting it and publishing it at length as required by the terms of the Oklahoma Constitution just quoted.

The petition in this case alleges (Rec., p. 8) that the state auditor holds that said Section 7 has no application to income taxes and has refused to accept income taxes under the provisions of said Section 7 and has stated that if appellant should pay him the amount assessed that he, the said auditor, would refuse to hold same as provided in said Section 7, and that he would pay the same into the state treasury forthwith. It is true that the answer contains a general denial and also specially denies that the auditor refused to accept the money as alleged, and denies that a tender was made. It does not *specially* deny that he holds that said Section 7 has no application and that he said he would pay the money into the Treasury. Said Section 7 does not make the State of Oklahoma liable for the tax. If the auditor paid the money into the treasury, it could not be paid out again except by appropriation by Act of the Legislature (Sec. 53, Art.

5, Const. Okla.). This surely is not an adequate remedy.

The bill further alleges that the auditor's bond is insufficient to protect him. The appellees claim that we are mistaken as to the amount of his bond and that his bond is really Fifty Thousand ($50,-000.00) Dollars. Even so, the bond is still inadequite to protect appellant. The assessment involved here is nearly Eighty Thousand ($80,000.00) Dollars. The state cannot require appellant to look to the auditor unless it first requires the auditor to give a sufficient bond. A mere right to bring a suit is not always an adequate remedy. *Raymond* v. *Chicago Union Traction Co.,* 207 U. S. 20.

Equity also has jurisdiction because the tax is a cloud on the title of appellant's real estate in Oklahoma.

But it would seem that no further argument was necessary. As we view it, the same question was involved in *Gypsy Oil Company* v. *Howard, State Auditor,* in the Western District of Oklahoma, and it was held that Section 7 of Sub-division B of Chapter 107 only applies to ad valorem taxes. That case was appealed to this court and affirmed on the merits in a memorandum opinion May 6, 1918. This court would not have affirmed the case on the merits if the plaintiff in that action had had an adequate remedy at law.

Conclusion.

We have printed as an appendix hereto the entire Chapter 164 of the Oklahoma Session Laws of 1915, which is the act relating to income taxes, and also the first section of the Gross Production Tax Law of 1916, and the first section of Sub-division A, of the Revenue Act of 1915, covering the gross production tax.

The appellant has no desire to evade the payment of a lawful tax. He paid the State of Oklahoma more than One Hundred Thousand Dollars gross production on the oil produced in 1916, besides considerable ad valorem taxes on non-producing property. He, of course, pays large taxes to the Government. It is not a subject of criticism that men oppose unlawful taxes. In *State* v. *Frear*, 148 Wis. 456, 134 N. W. 673, Ann. Cas. 1913-A, 1147, the court said:

> "Since the days when Hampden refused to pay the ship money unjust taxation has been deemed by English speaking nations at least, to vitally concern, if not to destroy the liberties of the people. Such taxation has been deemed to justify armed resistence, and, if need be, revolution. Insistence upon it cost Charles I his life and England an empire. If this law in its essential provisions violates constitutional provisions, and hence is void, taxation under it is, of course, unjust, and the sums which may be collected under it are unlawfully collected."

In the case at bar if the *situs* of the income is in Illinois, Oklahoma has no jurisdiction over it. If Oklahoma has collected one excise tax from appellant's business she should not collect another. She should not collect a tax on a business or occupation of a private individual merely because it is well managed and, therefore, prosperous. The principle which taxes an individual in proportion to his wealth can have no application to a business or occupation. She cannot tax an interstate commerce business.

It is urged that if non-residents can escape payment of income taxes in Oklahoma, people will leave the state to evade the payment. There is no difference between such a case and a case where money and property is moved for the same purpose and yet it has never been held that when money or property is moved the state could tax it. The record shows that appellant never lived here, although before statehood he could have lived here without paying any tax whatever.

It is also said that because appellant is obtaining the benefits of the natural resources of the state, he should be made to pay. But in developing the natural resources of the state he pays the state in gross production tax all it asks for the privilege. When the gross production tax was first proposed and again when it was amended, one of the reasons

given for imposing it was that the oil people were obtaining the natural resources, and the per centum fixed was what was considered a fair return to the state for that privilege.

The questions in this case cannot be obscured by the fact that appellant is making money out of the resources of the state.

The appellees retire from office on the second Monday in January, 1919, therefore, this action will abate unless disposed of prior to that time.

We respectfully request that this case be reversed with instructions to the lower court to grant the temporary injunction prayed for.

Respectfully submitted,

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APPENDIX.

CHAPTER 164.

TAXATION—INCOME TAX.

(House Bill No. 599.)

AN ACT providing for an income tax and repealing Article 17, Chapter 72, Revised Laws of Oklahoma, 1910.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

Income Tax Against All Persons:

Section 1. Each and every person in this state, shall be liable to an annual tax upon the entire net income of such person arising or accruing from all sources during the preceding calendar year, and a like tax shall be levied, assessed, collected and paid annually upon the entire net income from all property owned, and of every business, trade or profession carried on in this state by persons residing elsewhere.

Sworn Report to Auditor by March 1.

Section 2. On or before the first day of March of each year, each person liable for an income tax under the provisions of this act shall file with the

State Auditor a sworn return of his net income for the year ending December 31st, last preceding upon blanks to be prescribed by said State Auditor and furnished to the taxpayers. Said statement shall be made as near as practical at the time of making the federal income tax return.

Penalty for Failure to Make Report—False Report.

Section 3. Any person liable for an income tax under the provisions of this act, who shall fail, refuse or neglect to make the return under oath as required by this act, on or before the first day of March for the last preceding calendar year, shall be liable to a penalty of one hundred dollars in addition to the said tax, to be collected as other taxes are collected. Any person required by law to make, render, sign or verify any return under this act, and who makes any false or fraudulent return or statement with intent to defeat or evade the payment of the tax herein levied, shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding one thousand dollars, or by imprisonment in the county jaily not to exceed six months, at the discretion of the court, with the cost of prosecution.

Auditor to Make Rules and Furnish Blanks.

Section 4. The State Auditor is hereby empowered to prescribe and promulgate such rules and regulations as may be necessary to carry out the pro-

visions of this act, and shall prepare and furnish for the use of persons liable for the income tax hereunder all necessary blank affidavits and other forms for making the income tax returns.

"Income"—Definition and Scope of Term.

Section 5. The term "income" as used in this act, shall include:

(a) All rentals derived from real estate or any interests thereunder of a potential duration of two years or more.

(b) All interest derived from money loaned or invested in notes, mortgages, bonds or other evidence of debt of any kind whatsoever.

(c) All wages, salaries or fees derived from services; *Provided,* that compensation of public officers for public services shall not be computed as a part of the taxable income in such cases where the taxation thereof would be repugnant to the Constitution.

(d) All dividends or profits derived from stocks or from the purchase and sale of any property, or other valuables acquired within one year previous, or from any business whatsoever.

(e) All royalties derived from the possession or use of franchises or legalized privileges of any kind.

(f) And all other income of any kind derived from any source whatsoever, except such as is exempt from taxation hereunder by some law of the United States or of this state.

Incomes—How Estimated—Deductions.

Section 6. In computing the net income taxable under the provisions of this act, there shall be allowed as deductions from the income of any person:

First: The necessary expenses actually paid in carrying on any business, not including personal, living or family expenses;

Second: All interest paid within the year by a taxable person on indebtedness;

Third: All state, county, school and municipal taxes paid within the year, not including those assessed against local benefits;

Fourth: Losses actually sustained during the year incurred in trade, or arising from fires or storms, and not compensated for by insurance or otherwise;

Fifth: Debts due to the taxpayer actually ascertained to be worthless and charged off within the year;

Sixth: A reasonable allowance for the exhaustion, wear and tear of property arising out of its use of employment in the business not to exceed in the case of mines, five per centum of the gross value,

at the mine of the output for the year for which the compensation is made, but no deduction shall be made for any amount of expense of restoring property or making good the exhaustion thereof for which an allowance is or has been made: *Provided,* that no deduction shall be allowed for any amount paid out for new buildings, permanent improvements, or betterments, made to increase the value of any property or estate.

Computing Tax-Graduated Tax.

Section 7. There is hereby levied annually a tax for the current expenses of state government, upon all incomes taxable hereunder in excess of three thousand ($3,000.00) dollars to be computed upon the following rates:

(a) On the first ten thousand ($10,000.00) dollars of such excess or any part thereof, at the rate of ten mills on the dollar.

(b) On the next fifteen thousand ($15,000.00) dollars of such excess or any part thereof, twenty mills on the dollar.

(c) On the next twenty-five thousand ($25,000.00) dollars of such excess or any part thereof, thirty mills on the dollar.

(d) On the next fifty thousand ($50,000.00) dollars of such excess or any part thereof forty mills on the dollar.

(e) And on all such excess in addition to the aforesaid amounts, fifty mills on the dollar.

The said tax shall in all cases be computed by adding together the amounts payable under each of said classes.

Net Income — What Constitutes — Deductions for Spouse or Child.

Section 8. The Auditor shall be authorized to allow every person as net income not taxable, the following deductions:

(a) To an individual, nothing beyond the said sum of three thousand ($3,000.00) dollars.

(b) But to an individual living with his or her spouse an additional one thousand ($1,000.00) dollars.

(c) For each child under the age of eighteen years the sum of three hundred ($300.00) dollars additional.

(d) For each child and every person for whose support the taxpayer is legally liable and who is actually and solely supported by and totally dependent upon and or actually and permanently domiciled with the taxpayer, an additional $500.00, while such dependent is engaged solely in acquiring an education, and two hundred ($200.00) dollars in other cases. In computing said exemptions and the amount of taxes payable under this act, the income of the wife shall

be added to the income of her husband, and the income of each child under eighteen years of age, to that of its parent or parents when said wife or child is not living separately from said parent or parents.

Auditor May Revise Returns—Hearings.

Section 9. The State Auditor is authorized to revise any returns that may be made to him, and he shall notify the party making such return of such revision on or before the first Monday in May following, and the Auditor shall hear and determine all complaints arising from such revision which are made before the first Monday in June following thereafter, and he shall have the same power to correct and adjust such assessment of income as is now given by law to the County Board of Equalization in cases of assessments of property ad valorem and the remedy and proceedings before the said Auditor shall be the same as those provided for reviewing assessments of property ad valorem by the County Board of Equalization.

When Payable—Delinquent—Collection.

Section 10. The State Auditor shall complete the assessments of income for each person and compute the tax thereon on or before the first Monday in June of each year, and such taxes shall be due and payable upon the fifteenth day of June, and shall become delinquent if not paid on

or before the first day of July next following. Whenever any such tax becomes delinquent, the State Auditor shall have power, and it shall be his duty, to issue to any sheriff of this state, a warrant, such as is provided in Section 7392, Revised Laws of Oklahoma, 1910, except that it shall command him to pay the amount collected to the State Auditor. Such proceedings shall be had thereon as upon a tax warrant issued by a county treasurer for delinquent taxes.

Delinquent Taxes Lien on Property.

Section 11. If any of the taxes herein levied become delinquent, they shall become a lien on all the property, personal and real, of such delinquent person, and shall be subject to the same penalties and provisions as are all ad valorem taxes.

Income Tax Returns Not to Be Printed.

Section 12. It shall be unlawful for any person to print or publish in any manner whatever, any income tax return or any part thereof, or the taxes due thereon, unless the tax herein becomes delinquent; and any person violating the provisions of this section shall be deemed guilty of a misdemeanor and shall be fined not to exceed fifty ($50.00) dollars and imprisonment in the county jail not more than thirty days for each offense

Repeal.

Section 13. Article seventeen of chapter seventy-two, Revised Laws of Oklahoma, 1910, is hereby repealed.

Approved March 17, 1915.

SECTION 1 OF CHAPTER 39 OF THE SESSION LAWS OF OKLAHOMA OF 1916, Being the Section imposing the Gross Production Tax on oil or other minerals, is as follows:

> "Section 1. That Section 1 of Subdivision A, Article 2, Chapter 107, Session Laws of Oklahoma, 1915, be and the same is hereby amended to read as follows:
>
> Section 1. That Section 7464, Revised Laws of Oklahoma, 1910, be amended to read as follows:
>
> Section 7464. Every person, firm, association or corporation engaged in the mining or production within this state of asphalt or of ores bearing lead, zinc, jack, gold, silver or copper, or of petroleum or other crude oil or other mineral oil or natural gas, shall within thirty days after the expiration of the quarter-annual period ending on the last day of March, A. D. 1916, and of each quarter-annual period thereafter expiring respectively, on the last day

of June, September, December and March of each year, file with the State Auditor, a statement under oath, on forms prescribed by him showing the location of each mine or oil or gas well operated by such person, firm, corporation or association during the last preceding quarter-annual period; the kind of such mineral, oil or gas produced; the gross amount thereof produced, and the actual cash value thereof at the place of production; the amount of the royalty payable thereon, if any, to whom payable and whether it is claimed that such royalty is exempt from taxation by law, and the facts on which such claim of exemption, if any, is based; and such other information pertaining thereto as the State Auditor may require, and shall at the same time pay to the State Auditor a tax equal to one-half of one per centum of the gross value of asphalt and of ores bearing lead, zinc, jack, gold, silver and copper produced, less the royalty interest, and equal to three per centum of the gross value of the production of petroleum or other crude or mineral oil and of natural gas, less the royalty interest. The owner of any royalty interest shall pay to the State Auditor the tax herein imposed upon such royalty interest within the time and in the manner provided by this Act.

The tax hereby declared shall also attach to and is levied on what is known as the royalty interest except such royalty interest of the State of Oklahoma or such royalty interests as are exempted from taxation under the laws of the United States and the amount of the tax on the royalty interest shall be a lien on such interest.

The State Auditor shall have power to require any such person, firm, corporation or association engaged in the mining or the production of such asphalt, mineral ores aforesaid, petroleum or other crude oil or other mineral oil and natural gas or owner of any royalty interest therein to furnish any additional information by him deemed to be necessary for the purpose of correctly computing the amount of said tax and to examine the books, records and files of such person, firm, corporation or association and shall have power to examine witnesses, and if any witness shall fail or refuse to appear and testify at the summons or requests of the State Auditor, said State Auditor shall certify the facts and the name of the witness so failing and refusing to appear and testify or to produce any book, record or file to the District Court of this state having jurisdiction of the party, and said court shall thereupon issue a summons to said party to appear and give such evidence and produce such books, records and files as may be required and upon failing to do so, the offending party shall be punished as provided by law in cases of contempt.

The State Auditor shall have power to ascertain and determine whether or not any return herein required is a true and correct return of the gross products and of the value thereof of such person, firm, corporation or association engaged in the mining or production of asphalt and ores bearing minerals aforesaid and of petroleum or other crude oil or mineral oil and of natural gas, and if any person, firm, corpora-

tion or association has made an untrue or incorrect return of the gross production or value thereof, as hereinbefore required, or has failed or refused to make such return, the said State Auditor shall ascertain the correct amount of either, and compute said tax.

The payment of the taxes herein imposed shall be in full and in lieu of all taxes by the state, counties, cities, towns, townships, school districts and other municipalities upon any property rights attached to or inherent in the right to said minerals, upon leases for the mining of asphalt and ores bearing lead, zinc, jack, gold, silver or copper or for petroleum or other crude oil or other mineral oil or for natural gas upon the mining rights and privileges for the minerals aforesaid belonging or appertaining to land, upon the machinery, appliances and equipment used in and around any well producing petroleum or other crude or mineral oil or natural gas, or any mine producing asphalt, or any of the mineral ores aforesaid and actually used in the operation of such well or mine; and also upon the oil, gas, asphalt or ores bearing minerals hereinbefore mentioned during the tax year in which the same is produced, and upon any investment in any of the leases, rights, privileges, minerals or property hereinbefore in this paragraph mentioned or described; but any interest in the land other than that herein enumerated, and oil in storage, asphalt, and ores bearing the minerals hereinbefore named, mined, produced and on hand at the date as of which property is assessed for general and ad valorem tax-

ation for any subsequent tax year shall be assessed and taxed as other property within the taxing district in which such property is situated at the time.

The State Board of Equalization, upon its own initiative, may, and upon complaint of any person who claims that he is taxed too great a rate hereunder, shall, take testimony to determine whether the taxes herein imposed are greater, or less than the general ad valorem tax for all purposes would be on the property of such producer subject to taxation in the district or districts where the same is situated, including the value of oil, gas, or mineral lease, or of the mining or mineral rights, the machinery, equipment or appliances used in the actual operation of, in and around any such well or mine, the value of the oil, gas, asphalt or any of the said mineral ores produced and any other element of taxable value in lieu of which the tax herein is levied. The said board shall have power and it shall be its duty to raise or lower the rates herein imposed to conform thereto. An appeal may be had from the decision of the State Board of Equalization thereon, by any person aggrieved, to the Supreme Court, in like manner and with like effect as provided by law in other appeals from said board to said court; *provided,* that after such tax has been collected and distributed, or paid without protest, no complaint with reference to rate thereof shall be heard or considered."

SECTION 1 OF SUB-DIVISION A, OF CHAPTER 107, OF THE SESSION LAWS OF OKLAHOMA OF 1915, Being the section imposing the Gross Production Tax on oil or other minerals, is as follows:

"Section 1. That Section 7464, Revised Laws of Oklahoma of 1910, be amended to read as follows:

'Section 7464. For the purpose of estimating the value of any property rights attached to or inherent in the right to mineral in this state after the same is segregated from the ore in place, and in lieu of any other method of taxing the same and in lieu of any other taxes that might be levied and collected upon an ad valorem basis upon the equipment and machinery in and around any well producing natural gas or petroleum or other mineral oil and used in actual operation of such producing well from which a gross production tax is collected as herein provided (but oil or other mineral if on hand for more than thirty days at tax rendering period shall be taxed ad valorem in the taxing district where situated), every person, firm, association or corporation engaged in mining or production within this state, of asphalt, or of ores bearing lead, zinc, jack, gold, silver, copper or petroleum or other mineral oil or of natural gas, shall within thirty days after the expiration of each quarter annual period expiring respectively on the last day of June, Sep-

tember, December and March of each year file with the State Auditor a statement under oath, on forms prescribed by him, showing the location of each mine, or oil or gas well, operated by such person, firm, corporation or association during the last preceding quarter annual period the kind of mineral, oil or gas; the gross amount thereof produced; and actual cash value thereof; and such other information pertaining thereto as the State Auditor may require, and shall at the same, pay to the State Auditor gross production tax equal to one-half of one per centum of the gross value of ores produced therefrom bearing lead, zinc, jack, gold, silver or copper or asphalt; two per centum of the gross value of the production of petroleum or other mineral oil or natural gas; *provided, however*, that the State Auditor shall have power to require every such person, firm, association or corporation engaged in mining or the production of minerals, to furnish any additional information by him deemed to be necessary for the purpose of computing the amount of said tax and to examine the books, records and files of such person, firm, association or corporation; and shall have power to examine the witnesses and if any witness shall fail or refuse to appear at the summons or request of the State Auditor, said State Auditor shall certify the facts and the name of the witness so failing and refusing to appear to the District Court of this state having jurisdiction of the party, and said court shall thereupon issue a

summons to the said party to appear and give such evidence as may be required, and upon a failure to do so, the offending party shall be punished as provided by law in cases of contempt. For the purpose of ascertaining whether or not any return so made is the true and correct return of the gross receipts of such person, firm, association or corporation engaged in mining or the production of minerals, and whenever it shall appear to the State Auditor that any such person, firm, association or corporation engaged in mining or the production of minerals has unlawfully made an untrue or incorrect return of its gross production or value as hereinbefore required, he shall ascertain the correct amount of either and compute said tax; *provided*, that any such person, firm, association or corporation shall at the time of making its report to the State Auditor set out specifically the amount of the royalty, if any, exempt from taxation by law and in computing the said tax shall pay on the actual cash value of the entire gross production, less such exempt royalty; *provided, further*, that wherever the mining of ores bearing lead, zinc, jack, gold, silver or copper or petroleum or other mineral oil, or natural gas, is so carried on and conducted through a federal agency, that the state has no authority to impose and collect therefrom a gross production tax, that as to all such persons, firms, associations or corporations engaged in the mining of ores bearing lead, zinc, jack, gold, silver, copper or other mineral oils

or natural gas, such property of such person, firm, associations or corporations, including leases when the same are subject to be taxed by the state, shall be taxed on an ad valorem basis, and not be subject to the gross production tax, provided to be levied in this act'."

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No. [redacted] 375

In the Supreme Court of the United States.

October Term, 1917

CHARLES B. SHAFFER, Appellant,

vs.

E. B. HOWARD, State Auditor of the State of Oklahoma, and JOHN S. WOOFTER, Sheriff of Creek County, State of Oklahoma.

Appeal from the District Court of the United States for the Eastern District of Oklahoma.

ANSWER BRIEF ON BEHALF OF APPELLEES.

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Appeal from the District Court of the United States for the Eastern District of Oklahoma.

ANSWER BRIEF ON BEHALF OF APPELLEES.

STATEMENT.

This is an appeal by Charles B. Shaffer, a citizen and resident of the state of Illinois, from an order denying injunction against officers of the state of Oklahoma, in the matter of the collection

of income tax from the said Charles B. Shaffer, appellant, on account of income derived from business conducted in this state. The statement of the case as made by appellant and the pleadings as set forth in appellant's brief are correct. Appellant discusses the objection of appellees to the jurisdiction of the court under the last subdivision of his brief. We will present that phase of the case first, and then follow the order adopted by the appellant.

Appellant Has Adequate Remedy at Law.

In the district court a plea to the jurisdiction was filed:

FIRST: For the reason that plaintiff below has a plain, adequate and complete remedy at law, in that the income tax act, by reference to the General Ad valorem Tax acts of Oklahoma, provides that the remedies available to the aggrieved taxpayer as to ad valorem tax are equally available to an aggrieved taxpayer as to income tax.

SECOND: For the reason that plaintiff below does not show himself entitled to equitable relief upon either of the grounds upon which equitable jurisdiction depends, in that he does not show that irreparable loss, or irremediable damage will ensue, or that a muitiplicity of suits will follow, or that a cloud will be cast upon his property, and that he would be damaged thereby; or any other ground of equitable cognizance.

THIRD: For the reason that plaintiff does not allege that he has sustained losses in his business carried on in other states to the extent that he is entitled to any reduction on that account, and is therefore not entitled to be heard to complain upon that ground.

As to the first and second propositions, Section 9, Ch. 164, S. L. 1915, is as follows:

> "The State Auditor is authorized to revise any returns that may be made to him, and he shall notify the party making such returns of such revision on or before the first Monday in May following, and the Auditor shall hear and determine all complaints arising from such revision, which are made before the first Monday in June following thereafter, *and he shall have the same power to correct and adjust such assessment of income as is now given by law to the county board of equalization in cases of assessments of property advalorem, and the remedy and proceedings before said State Auditor shall be the same as those provided for reviewing assessments of property ad valorem by the county board of equalization.*"

The above is from the Income Tax Act under which the State Auditor is attempting to collect the tax in the instant case, and it is the position of appellees that the above has the purpose of providing and does provide for the same remedies and procedure for an aggrieved taxpayer under an

income tax assessment as is provided by the ad valorem tax law for an aggrieved taxpayer, and the Auditor is given the same authority as is conferred upon the county board of equalization in cases of assessments of property ad valorem.

We will next inquire as to the powers of the county board of equalization and the right of an aggrieved taxpayer thereunder. Sec. 2, Ch. 107, S. L. 1915, p. 147, in part reads as follows:

> "Any taxpayer, feeling aggrieved at the assessments made by the assessor, or the equalization as made by the county board of equalization, may during the session of said board, or, if the same is closed, with in ten days after the first Monday in June, file with the assessor as secretary of said board, a written complaint specifying his grievances and the pertinent facts in relation thereto, in ordinary and concise language and without repetition, in such manner as to enable a person of common understanding to know what is intended; *and said board shall be authorized and empowered to take evidence pertinent to said complaint, and for that purpose is authorized to compel the attendance of witnesses and the production of books and papers by subpoena and to correct or adjust the same as may seem just.*"

The above section confers power to correct and adjust the assessment to any extent as may seem just to the county board of equalization. This power is an extension of the ordinary power con-

ferred upon a board of equalization, and is a power greater than that conferred upon the state board of equalization, which is limited to raising or lowering assessments, but under the above section, the county board has the power to determine whether an assessment is wrongful in part, or in whole, and to correct and adjust the same in part or in whole. In other words, if the entire assessment were illegal and void, the county board would be empowered to efface the same from the record, while on the other hand, if it were illegal in part only, the illegal portion of the tax would be cancelled.

It is conceded by both parties to this controversy that the right of appeal does not lie from the action of the State Auditor in revising the income tax return and making the assessment.

We now direct the attention of the court to Section 7, Ch. 107, p. 49 of the General Ad Valorem Tax Act, S. L. 1915, wherein the remedy contended for by appellees is as follows:

> "In all cases where the illegality of the tax is alleged to arise by reason of some action from which the laws provide no appeal, the aggrieved person shall pay the full amount of the taxes at the time, and in the manner provided by law, and shall give notice to the officer collecting the taxes, showing the grounds of complaint, and that suit will be brought against the officer for recovery of them. It shall be the duty of such collecting officer to hold such taxes separate

> and apart from all other taxes collected by him for a period of thirty days, and if within such time summons shall be served upon such officer in a suit for recovery of such taxes, the officer shall further hold said taxes until the final determination of such suit."

The three sections above quoted, the first from the Income Tax Act, and the latter two from the Ad Valorem Tax Act, in the opinion of appellees, afford a plain, complete and adequate remedy at law, which could be pursued by appellant in either Federal or State court, as he saw fit. The Income Tax section quoted provides that the proceedings before the auditor shall be the same as those before the county board of equalization, and the same remedies shall obtain. The second quoted section sets out these remedies, which appear to be ample, and the third quoted section provides for the paying of the tax, affords a right of action for the recovery of same, after giving notice of intention to sue therefor, and makes it incumbent upon the collecting officer to hold the tax pending final determination of the suit.

Here we desire to call the attention of the court to the fact that the General Revenue Law of the United States, being sections 3220, 3226, and 3227, Stat. A. L. (Comp. Stat. 1913, 5944, 5949 and 5950), was made applicable to the Federal income tax section of the tariff act of October 3, 1913, by paragraph "L" of that Act, which provides that the provisions of law, including those

relating to the assessment, remission, collection and refund of internal revenue taxes, not heretofore specifically repealed and not inconsistent with the provisions of that section, were made applicable to all the provisions of the income tax Act therein imposed. In the case of *Dodge* v. *Osborn*, 240 U. S. 188, 60 L. Ed. 557, it was held that the reference as above stated in the income tax section of the tariff act was ample to afford remedy for aggrieved taxpayers under the income tax section, in that they must pay the tax and sue therefor as provided in the General Tax Act.

The first paragraph of the syllabus to said case of *Dodge* v. *Osborn*, *supra*, reads as folloows:

> "The inhibition of U. S. Rev. Stat. Sec. 3224 (Comp. Stat. 1913, Sec. 5947), against suits to restrain the assessment or collection of a tax, and the provisions of Sections 3220, 3226, 3227 (Comp. Stat. 1913, Sections 5944, 5949, 5950), making an appeal to the Commissioner of Internal Revenue after payment and his refusal to refund prerequisites to a suit to recover taxes erroneously or illegally assessed and collected, are made applicable to taxes imposed under the income tax section of the tariff of October 3, 1913 (38 Stat. at L. 166, Chap. 16), by par. L of that act, which provides that all administrative, special, and general provisions of law, including the laws in relation to the assessment, remission, collection, and refund of internal revenue taxes not heretofore specifically repealed, and not inconsistent with

> the provisions of this section, are hereby extended and made applicable to all the provisions of this section and to the tax herein imposed."

It would seem that the above construction of the Federal Income Tax Act should be highly persuasive in construing a provision of the state law very similar in terms to the Federal Act.

Appellant raises the question of the validity of the provision of the Income Tax Act making reference to the ad valorem tax act by measuring it with section 57, Art. 5, of the Constitution of Oklahoma, which reads as follows:

> "Every act of the Legislature shall embrace but one subject, which shall be clearly expressed in its title, except general appropriation bills, general revenue bills, and bills adopting a code, digest or revision of statutes; (and no law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only); but so much thereof as is revived, amended, extended, or conferred shall be re-enacted and published at length; Provided, That if any subject be embraced in any act contrary to the provisions of this section, such act shall be void only as to so much of the law as may not be expressed in the title thereof."

Appellant relies on the latter sub-division of said section and contends the reference in the Income Tax Act is an attempt to amend and extend

the provisions of the advalorem tax act, and that in the light of the above constitutional inhibition, the same is invalid.

In answer to the contention of appellant, we refer to case of *City of Pond Creek* v. *Haskell*, 21 Okla. 711, 97 Pac. 338, which was a case involving an Oklahoma statute, providing for the creation of new counties, the location of county seats, and that the elections therefor should be held under the procedure then existing governing elections generally. The act was attacked in that case on the same ground that appellant urges against the law relied on by appellees in this case. After quoting from a large number of authorities, the Oklahoma Supreme Court, in said case of *City of Pond Creek* v. *Haskell*, *supra*, held the act to be valid. We quote the following adopted by the Oklahoma court in that case from the Supreme Court of Michigan, construing the identical language:

> "It is next objected that the law is invalid because in conflict with section 25 of article 4 of the Constitution, which provides that 'no law shall be revised, altered, or amended by reference to its title only; but the act revised, and the section or sections of the act altered or amended, shall be re-enacted and published at length.' The act before us does not assume in terms to revise, alter, or amend any prior act, or section of an act; but by various transfers of duties it has an amendatory effect by implication, and by its last section it repeals all

inconsistent acts. We are unable to see how this conflicts with the provision referred to. If, whenever a new statute is passed, it is necessary that all prior statutes, modified by it by implication, should be re-enacted and published at length as modified, then a large portion of the whole code of laws of the state would require to be republished at every session, and parts of it several times over, until, from mere immensity of material, it would be impossible to tell what the law was. If, because an act establishing a police government modifies the powers and duties of sheriffs, constables, water and sewer commissioners, marshals, mayors and justices, and imposes new duties upon the executive and the citizen, it has thereby become necessary to re-enact and republish the various laws relating to them all as now modified, we shall find, before the act is completed, that it not only embraces a large portion of the general laws of the State, but also that it has become obnoxious to the other provisions referred to, because embracing a large number of objects, only one of which can be covered by its title. This constitutional provision must receive a reasonable construction, with a view to give it effect. The mischief designed to be remedied was the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effect, and the public, from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws. An amendatory act which purported only to insert certain

words, or to substitute one phrase for another in an act or section which was only referred to, but not republished, was well calculated to mislead the careless as to its effect, and was, perhaps, sometimes drawn in that form for that express purpose. Endless confusion was thus introduced into the law, and the Constitution wisely prohibited such legislation. But an act complete in itself is not within the mischief designed to be remedied by this provision, and cannot be held to be prohibited by it without violating its plain intent."

The syllabus in the case reads as follows:

> "A law which does not assume, in terms, to revise, alter, or amend any prior act, or section of an act, but by various transfers of duties has an amendatory effect by implication, although it expressly repeals all inconsistent acts, does not conflict with section 25 of Article 4 of the Constitution."

In the same opinion the court, quoting with approval from *People* v. *Bank*, 67 N. Y. 575, adopts this language:

> "It is not necessary in order to avoid a conflict with this article of the Constitution, to re-enact general laws whenever it is necessary to resort to them to carry into effect a special statute. Such cases are not within the letter or spirit of the Constitution, or the mischief intended to be remedied. By such a reference the general statute is not incor-

porated into or made a part of the special statute. The right is given, the duty declared, or burden imposed by the special statute; but the enforcement of the right or duty and the final imposition of the burden are directed to be in the form and by the procedure given by the other and general laws of the state. Reference is made to such laws, not to affect or qualify the substance of the legislation, or vary the terms of the act, but merely for the formal execution of the law. The evil in view in adopting this provision of the Constitution was the incorporating into the acts of the Legislature, by reference to other statutes, of clauses and provisions of which the legislators might be ignorant, and which affecting public or private interests in a manner and to an extent not disclosed upon the face of the act, a bill might become a law, which would not receive the sanction of the Legislature if fully understood.' The syllabus of the case elucidates the point involved and shows the relation of the decision to the case at bar, and is as follows: "Act Dec. 17, 1894 (Acts 1894-95, p. 186), relieving the judge of probate from official connection with the board of revenue of a certain county, and devolving on a chairman, selected by the board, and the clerk of the circuit court, the duties performed by such judge, is not invalid for the reason that it does not set out the original act creating boards of revenue so amended, as directed in Const. 1875, Art. 4, Sec. 2, providing that no law shall be amended by reference in its title only, but so much thereof as amended as shall be enacted and

> published at length; the constitutional provision applying only to amendments which, without the presence of the original act, are unintelligible."

As stated in the foregoing opinion of the Supreme Court of Oklahoma, a strict application of the constitutional provision relied on by appellant would require the frequent re-enactment of the entire system of procedure in order to validate any new enactment of law made subject to the former procedure, and which is declared in the opinion from which we quote not to have been the intention of the constitutional provision.

Appellant seeks further to strengthen his position that the state law does not afford an adequate remedy, in that he could not pay the tax to the auditor with safety for the reason that the auditor "holds that section 7, *supra,* has no application to income taxes, and has refused to accept income taxes under the provisions of said section 7, and has stated that if appellant should pay him the amount assessed, that he, the said auditor, would refuse to hold same as provided in section 7, and that he would pay the same into the state treasury forthwith." The above was especially denied by the appellees, and no proof was heard in the trial of the case, and the presumption would be that the auditor would do his duty and retain the money as provided by law.

It is further claimed by appellant that the auditor's bond is only $50,000, and he would be

unsafe in paying the money to said auditor on that account. In this connection, we call attention to the Oklahoma State Depository Law, which requires the state auditor, as well as other officers, to turn in, or deposit, money collected in their official capacity each day into the state depository, which is not the state treasury. The state treasurer is the official depository as distinguished from the state treasury by the provisions of chapter 238, p. 459, S. L. 1915, and receives money deposited with him daily by other officers, to be paid out as provided by law upon a proper voucher therefor by the depositing officer. Section 6 of said act governs the manner in which such funds may be withdrawn, and it is apparent from a reading of same that it is intended to cover money paid in by taxpayers, who intend to sue for the recovery of same under authority of the statutes hereinbefore quoted by appellees. A portion of the section reads:

> "All moneys deposited in the official depository as provided in sections one (1) and two (2) hereof shall be credited to the account of the officer, board or commission or employee thereof so depositing same, and may be withdrawn only in transfer to the state treasury such parts thereof as may be due the state or its funds or funds under its management, *and in refund of erroneous or excessive collections and credits.* * * *"

The bond of a tax-collecting officer is rarely, if ever, equal to the amount of tax money held by

him. Treasurers' bonds are never equal to the amount of money belonging to the state or municipality represented by them.

The contention, we think, that the taxpayer would be in danger of losing his money paid by virtue of the insufficiency of the tax-collecting officer's bond, is untenable, for the law does not presume misapplication or embezzlement of funds on the part of public officers; but, on the other hand, presumes that they will perform their duty and make proper accounting.

The claim by appellant that the tax constitutes a lien upon his property, and therefore a cloud on the title of his real estate, and that equity may be invoked on that account, would be unavailing in the event of the payment of the tax with the intention of bringing suit to recover same, for the reason that the payment thereof would *ipso facto* release the property from the lien, the same as the payment of the amount due, which was secured by a mortgage or other lien, would have the effect of discharging the lien.

Appellant next cites the holding of the court in case of *Gypsy Oil Co.* v. *Howard, State Auditor*, in the Western District of Oklahoma, wherein it was held that the provisions relied on by appellees as affording an adequate remedy did not apply to the gross production tax, and that that holding is authority for a similar holding as to the income tax. In this connection, we call attention to the fact that in the gross production tax act there is

no reference to the *ad valorem* tax act whereby the provisions of the *ad valorem* tax act are made available to litigants under the gross production tax act, whereas, in the income tax act, direct reference to said *ad valorem* tax law is made, and the remedies and procedures there available are specifically applied to the income tax.

A provision of the South Carolina tax law, in effect the same as the Oklahoma law, was considered in case of *City Council of Augusta* v. *Timmerman*, 233 Fed. 216, wherein the Circuit Court of Appeals of the Fourth Circuit, on May 2, 1916, denied relief by injunction on account of a legal remedy being afforded by the state statute, and announced the law governing that case as follows:

> "Ordinarily the collection of taxes will not be enjoined on the ground that the tax is illegal unless complainant has no adequate legal remedy.
>
> "A statutory provision for payment of taxes under protest and a legal action to recover them back affords an adequate remedy, and precludes enjoining collection.
>
> "Civil Code South Carolina 1912, p. 460, prohibits enjoining the collection of taxes, while section 461 provides that any property owner, deeming a tax charge against his property unjust or illegal, may pay it under protest and bring an action for the recovery thereof in the court of common pleas of the county in which such taxes are made payable. Section 462 makes this

remedy exclusive. Land of a non-resident was ordered sold in South Carolina for taxes, and the owner applied in the federal courts for an injunction; *held*, that, as a state statute conferring a substantive right cannot exclude a citizen of another state from asserting such right in the federal courts, the remedy given by the South Carolina statute was adequate, as the non-resident could sue in the federal courts to recover back the taxes illegally exacted, and so injunction would be denied."

Quoting from the body of the opinion in the last above cited case, we have the following:

"The general rule is that courts will not interfere by injunction with the collection of the public revenue, on the ground that the tax is illegal, unless it clearly appears that complainant has no legal remedy, and that a statutory provision for the payment of the taxes under protest and a legal action to recover them back affords an adequate remedy at law. *Dow* v. *Chicago*, 11 Wall. 108, 20 L. Ed. 65; *Boise Water Co.* v. *Boise City*, 213 U. S. 278, 29 Sup. Ct. 426, 53 L. Ed. 796; *Dalton Adding Machine Co.* v. *State Corp. Com'rs of Va.*, 236 U. S. 699, 35 Sup. Ct. 480, 59 L. Ed. 797; *Dodge* v. *Osborn*, 240 U. S. 118, 36 Sup. Ct. 275, 60 L. Ed. 557.

"It is insisted, however, that only in an injunction from the court of equity is an adequate remedy to be found, because (1) the tax levy being a lien on the land, consti-

tutes a cloud on the title; and (2) the assertion of complainant's claim to the exemption would require a multiplicity of legal actions. The Supreme Court has disposed of the first position by holding that there exists no cloud upon a title which justifies the interference of the court of equity, when the alleged fatal defect in the tax levy or other proceeding appears on the face of the record, requiring no evidence *aliunde* to make it plain. *Hannewinkle* v. *Georgetown*, 15 Wall. 547, 21 L. Ed. 231; *Ogden City* v. *Armstrong*, 168 U. S. 224, 18 Sup. Ct. 98, 42 L. Ed. 444.

"The complainant has not stated a case that entitles him to equitable relief under this rule. There could be no real issue of fact requiring evidence outside of the record about the nature of the property. The tax assessment would doubtless make that plain; and the sole question in a suit to recover the taxes would be a legal one, namely whether the statutory exemption from taxation of the waterworks and grounds occupied thereby, 'when owned by any city or town,' applies to waterworks and grounds occupied thereby owned by a city situated in another state. That this question could be decided with convenience and dispatch in an action at law to recover the taxes after paying them under protest is obvious."

The case of *Singer Sewing Machine Co.* v. *Benedict*, 229 U. S. 481, 57 L. Ed. 1289, the Supreme Court declares the rule contended for by the state in the instant case as follows:

> "A foreign corporation cannot maintain a suit in equity in the federal courts to enjoin the collection of city and county taxes in Colorado, which it claims were illegal and assessed without notice, where, under the Colorado law, the company could have recovered back from the county the money so paid if the taxes were illegal."

It may be contended that a different rule obtains where the tax law is attacked as being unconstitutional as distinguished from a merely invalid or illegal tax assessment. The Supreme Court in *Dodge* v. *Osborn*, 240 U. S. 116, 60 L. Ed. 557, has answered that contention in the following language:

> "And this doctrine has been repeatedly applied until it is no longer open to question that a suit may not be brought to enjoin the assessment or collection of a tax because of the alleged unconstitutionality of the statute imposing it. *Shelton* v. *Platt*, 139 U. S. 591, 35 L. Ed. 273, 11 Sup. Ct. Rep. 646; *Pittsburg, C. C. & St. L. R. Co.* v. *Board of Public Works*, 172 U. S. 32, 43 L. Ed. 354, 19 Sup. Ct. Rep. 90; *Pacific Steam Whaling Co.* v. *United States*, 187 U. S. 447, 451, 452, 47 L. Ed. 253, 255, 256, 23 Sup. Ct. 154."

We quote the syllabus of the parent case, *Shelton* v. *Platt*, 139 U. S. 591, 35 L. Ed. 273, upon this question as follows:

> 1. "A suit in equity will not lie to

restrain the collection of a tax on the sole ground that the tax is illegal, but there must exist, in addition, special circumstances bringing the case under some recognized head of equity jurisdiction."

2. "The jurisdictional allegation that the plaintiffs are without adequate remedy at law is a mere inference or conclusion, which must be made out by facts averred or proven."

3. "Where it does not appear that plaintiff is unable to pay the illegal tax, nor that the sale of the property levied on to pay the tax would subject plaintiff to irremediable loss, no case is made, on that ground, for equitable interference."

4. "The mere fact that the plaintiff's property is used in the conduct of interstate commerce does not give equity jurisdiction to restrain the collection of a tax thereon."

5. "In Tennessee the remedy by suit to recover back an illegal tax after payment, provided for by the statute, is exclusive."

6. "The mere unconstitutionality of a tax does not give a court of equity jurisdiction to restrain its collection."

7. "Proceedings to collect a void tax cannot be restrained by injunction where irreparable injury or other ground for equitable interposition is not shown to exist."

Mr. Black, at section 350, Black on Income Taxes (2nd Edition), has this to say:

> remedy exclusive. Land of a non-resident was ordered sold in South Carolina for taxes, and the owner applied in the federal courts for an injunction; *held*, that, as a state statute conferring a substantive right cannot exclude a citizen of another state from asserting such right in the federal courts, the remedy given by the South Carolina statute was adequate, as the non-resident could sue in the federal courts to recover back the taxes illegally exacted, and so injunction would be denied."

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It may be contended that a different rule obtains where the tax law is attacked as being unconstitutional as distinguished from a merely invalid or illegal tax assessment. The Supreme Court in *Dodge* v. *Osborn*, 240 U. S. 116, 60 L. Ed. 557, has answered that contention in the following language:

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3. "Where it does not appear that plaintiff is unable to pay the illegal tax, nor that the sale of the property levied on to pay the tax would subject plaintiff to irremediable loss, no case is made, on that ground, for equitable interference."

4. "The mere fact that the plaintiff's property is used in the conduct of interstate commerce does not give equity jurisdiction to restrain the collection of a tax thereon."

5. "In Tennessee the remedy by suit to recover back an illegal tax after payment, provided for by the statute, is exclusive."

6. "The mere unconstitutionality of a tax does not give a court of equity jurisdiction to restrain its collection."

7. "Proceedings to collect a void tax cannot be restrained by injunction where irreparable injury or other ground for equitable interposition is not shown to exist."

Mr. Black, at section 350, Black on Income Taxes (2nd Edition), has this to say:

"If there are any circumstances under which an individual or corporation, complaining of his or its assessment for the income tax, can succeed in procuring an injunction to restrain its assessment or collection, they must be very rare and exceptional. The general rule in such cases has been thus set forth by the United States Supreme Court:

" 'When a court of equity is asked to enjoin collection of taxes, it is essential that the case be brought within some of the recognized rules of equity jurisdiction, and neither illegality nor irregularity in the proceedings, nor error nor excess in the valuation, nor the hardship and injustice of the law, provided it be constitutional, nor any grievance which can be remedied by suit at law, either before or after the payment of the tax, will authorize an injunction against its collection; and no injunction can be granted until it is shown that all the taxes conceded to be due, or which the court can see ought to be paid, or which can be shown to be due, by affidavits, have been paid or unconditionally tendered."

The above is in reference to the federal income tax act, but the same principle applies with equal force to the case at bar, as the Oklahoma law provides as adequate a remedy as the federal act.

As to the third ground raised in appellee's plea to the jurisdiction of the trial court, nowhere in appellant's bill does he allege that he sustained

losses in other states which would entitle him to any reduction as to his income upon which he should pay tax, and, therefore, does not plead himself within the equity jurisdiction of the court. In order to be entitled to equitable relief, if upon other grounds his bill entitled him to same, it would be necessary to specifically allege that he himself had sustained losses in other states, which he was entitled to offset in Oklahoma by way of deductions. On this point appellant admits in his brief that he did not lose money on his business outside of Oklahoma for the year sought to be taxed. The fact that he belongs to a class, some of whom may at some time, by an individual circumstance, be placed in a position to show that by losses sustained outside of Oklahoma, while making profits within Oklahoma, they had to pay more tax than a resident of the state would have to pay, had his business status both within and without Oklahoma been the same as the non-resident, is not sufficient to bring appellant within the equity jurisdiction of the court.

We will now devote attention to the merits of the case in the order pursued by appellant:

PROPOSITION No. 1.
Nature of Oklahoma Income Tax.

The authority for the Oklahoma Income Tax

is found in section 12, article 10, of the Constitution, and is as follows:

> "The Legislature shall have power to provide for the levy and collection of license, franchise, gross revenue, excise, income, collateral and direct inheritance, legacy, and succession taxes; also, graduated income taxes, graduated collateral and direct inheritance taxes, graduated legacy and succession taxes; also, stamp, registration, production or other specific taxes."

As we understand the above grant of taxing power, insofar as the income tax is concerned, income as distinguished from every other species of ownership, right or property was designated as a proper subject for taxation. This income constitutes within itself a taxable entity, regardless of the source from which it springs, and has no relation to any particular property or business except such income must, *for jurisdictional purposes*, have been derived from a business, trade, profession or property located within the taxing state. This does not, however, connect the taxable income with any particular property, even though the entire income might have been derived from one particular class of property. The income which the state assumes to tax has been set apart as a taxable asset growing out of the exploitation of the resources of the state, or from the exercise of a business, trade or profession therein. This income is to be considered as separate and apart from its source,

whether derived from one business or property or more, or from the mixed ownership of various properties, in conjunction with the conduct of numerous business enterprises. The State of Oklahoma—like almost every other state enacting an income tax law—has sought to include the income derived from two sources; first, the entire income of all persons residing in this state, derived from both within and without the state; second, upon the income of all property owned, and of every business, trade or profession carried on within the state by persons residing elsewhere. Has the state the right to levy a tax upon income derived from the ownership of property or the conducting of a business, trade or profession within its limits by a person residing without the state, is the chief question involved in this controversy.

It is conceded that license taxes, franchise taxes, gross revenue taxes, excise taxes, transfer and inheritance taxes, production taxes, and other sorts of taxes may be levied and collected from non-residents, owning property within the state. If we consider the income tax as a tax other than a tax upon the property which produces it, as is contended by the appellees, and conceded by appellant in his brief, it does not differ from the above forms of taxation *insofar as the state's power to levy and collect the same exists.* The same rules governing the collection of other taxes from non-residents would obtain as to the income tax. Personal residence of the party taxed, on the one hand, and the

ownership of property within the state, on the other hand, by a non-resident, has always been held to confer jurisdiction to impose taxes—not alone *ad valorem* taxes, but every other class of taxes which the state is authorized by its Constitution to impose. It must not be considered that in order to be collectible, the income taxed must be derived from some form of property which could be sold under a tax lien. A tax lien is not restricted, in other words, to the property taxed, but spreads over the entire property within the jurisdiction owned by the person liable to pay the taxes. An inheritance tax is not a tax on property, and is as intangible as an income tax. It has been held, however, by all the courts in which the inheritance tax exists, that the same may be collected from non-resident heirs who have never resided within the state, and that a law making such a tax a lien upon the entire estate of the decedent is valid. The same might be said of other forms of taxation which are not directly laid upon property. Mr. Black, defining income tax, by section 187, uses this language:

> "An income tax is distinguished from other forms of taxation in this respect, that it is not levied upon property, nor upon the operation of trade and business, or the subjects employed therein, nor upon the practice of a profession or the pursuit of a trade or calling, but upon the acquisitions of the taxpayer arising from one or more or these sources or from all combined, annually, or at other stated intervals. * * *"

Plaintiff says an income tax is a form of taxation different from any other form of taxation. It is distinguishable from any other form of taxation, but has the same constitutional sanction and is authorized by the same section of the Constitution as every other form of state taxation, and the power to levy it is just as complete as that authorizing the levy of *ad valorem* taxes, and occupies a place of equal dignity with it.

It will be considered by the court that the income tax (as now regarded) is a new and growing form of taxation, having its origin in the growth of large modern fortunes, and having for its purpose the resting of the burdens of government upon those most able to pay.

In the Opinion of the Justices, dated March 1, 1915, and reported in — N. H. —, 93 Atl. 311, the Supreme Court of that state, in defining the principle of the income tax, says on page 354 of the body of the opinion:

> "It is important that at the outset the fundamental difference between income and property be stated; and then as we go on, it will be more plainly seen how and why the attempt to treat the two things as one must necessarily fail. A man's property is the amount of wealth he possesses at a particular moment, while his income is the amount of wealth obtained during some specific period. The two are measured by different standards. One is measured by amount and present possession. The other

is determined by receipts and quantity and time are necessary elements of the measure employed. In the measure of property, present ownership is an essential element, and lapse of time can have no place. Each is measurable, but a common measure cannot be applied to both. The two are as incommensurate as a line and an angle."

At page 315 of the same opinion the court says:

> "It is said that an income is property; that it can be assigned; that its value for the past year can be ascertained; and that, therefore, it is taxable like other property, Precisely the same argument, in all respects, can be urged as to property passing by will or inheritance. It is property; it can be sold; its value is ascertainable. Yet it is held that a tax upon property so passing is not a property tax within the constitutional rules as to equality and proportionability. If a tax levied upon property because it has passed from ancestor to heir is a privilege tax, or a tax upon the event, equally so is one levied upon property because it has passed from debtor to creditor. If, as was said in *Thompson* v. *Kidder*, 74 N. H. 89, 65 Atl. 392, 12 An. Cas. 948, there is a disproportion 'interest in the tax itself' when inheritances are taxed, the same is true when interest and dividends are levied upon. 'All the decisions agree * * * that an inheritance tax is not a proportional distribution of the public expense upon the property of the taxing district.' 74 N. H.

> 93, 65 Atl. 394, 12 An. Cas. 948. And it may be added that until the foregoing opinion was filed, there was a like consensus of judgment as to the nature of the tax upon incomes. A tax on incomes is not a tax on property and a tax on property does not embrace incomes. Property, as the term is used in reference to taxation, means the *corpus* of an estate or investment, as distinguished from the annual gain or revenue from it."

We have quoted above from the majority and dissenting opinions in the foregoing case, which agree on the propositions involved in the instant case.

As further proof that income tax should be considered as a separate tax from the property or business which produces the same, we quote from *Tyee Realty Co.* v. *Anderson*, 240 U. S. 115, 60 L. Ed. 554:

> "The whole purpose of the United States Constitution's Sixteenth Amendment, giving Congress the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration, *was to exclude the source from which a taxed income was derived*, as the criterion by which to determine the applicability of the constitutional requirements as to the apportionment of direct taxes." (Italics ours.)

The Situs of the Income in Oklahoma.

There seems to be no disagreement on the courts that an income tax is not a tax on the property producing it, and that is conceded by both parties to the present case, but the disagreement between the parties to this case is upon the question of situs. The position of appellees on the nature of the tax is that the Constitution has given income, as such, a taxable status, and that the Legislature has taxed the same and given it a situs within the state for the purposes of taxation. As we view income, it is an intangible entity and one springing from the resources of the taxing state. It is within the sovereign power of such state to legislatively give it a taxable situs therein.

In an effort to show that the situs of the income taxed is in Illinois. appellant cites case of *Adams* v. *Colonial, etc., Mortgage Co.,* 82 Miss. 263, 17 L. R. A. (N. S.) 138, 100 Am. St. Rep. 633. This was a case involving the taxability of mortgagee's interest in mortgages held by him upon real estate in Mississippi, while the mortgagee resided in Hull, England. It was held in that case, and very properly, that the board of supervisors of the county could not by an order fix the situs of a debt for the purpose of taxation. The case does not say that the Legislature could not have fixed the situs of the property for taxation in the State of Mississippi, but does hold the contrary. We quote from the body of the opinion as follows:

> "The Legislature of this state, therefore, has the undoubted power to pass a law subjecting the interest of every mortgagee in land in this state, though a non-resident of the state, to taxation here, legislatively fixing the situs of that interest in this state for the purpose of taxation by this state, which protects the mortgagee, and furnishes him the sole forum for enforcing his claim. And we wish to add, with all the emphasis which we can command, that the next Legislature of this state ought to pass just such an act promptly. The record in these cases discloses the great necessity for such legislation."

Appellant says at page 65 in his brief:

> "There can be no grounds for any taxation establishing the situs of his income here, when he, the owner, lives in Chicago, and the income is actually there and has never been in Oklahoma. When the proceeds of appellant's business here takes the form of income, it is already in his hands. It no longer pertains to the business. The expense of the business has been paid, and the net profits are out of the business. Even if the money received from the business here were temporarily deposited in Oklahoma banks to appellant's credit, not for the purpose of reinvestment in this state, it would not be taxable here."

Here appellant cites cases holding that bank deposits placed in the bank of a state merely for

the purpose of transmittal to the owner of such deposits residing in another state, are not taxable by the state in which the deposit is temporarily made. The cases cited by appellant place bank deposits in the class of debts and the non-resident as a creditor of the bank, and under the general rule that debts follow the person of the creditor, hold that a non-resident creditor cannot be said to be, in virtue of a debt which a resident owes him, owner of property within the limits of the taxing state, on the theory that the credit is not within the taxing state's jurisdiction, but is taxable at the place of residence of the owner. That class of cases has no application to the right of the state to fix situs of property for taxation that has its origin within the jurisdiction of the state. Other cases cited by appellant are decided on the basis that deposits in national banks are not taxable by the state for the reason that such deposits become the property of the bank, and the bank, being the instrumentality of the federal government, cannot be taxed upon the same, which, of course, have no application to the case at bar.

Appellant takes the position that simultaneously with the origin of the existence of the income it assumes a situs at its owner's domicile, and, therefore, never acquires such state of existence in Oklahoma as to permit the Legislature to give it a situs for taxation. He loses sight of the fact that the income taxed is the volume thereof covering a calendar year—not any particular earning or

transaction—the sum total of the year's production, less the deductions and exemptions allowed. Appellant's position would strike down the essential part of the income tax law of every state imposing such a tax. It would deny the right of the federal government to tax non-residents, deriving an income from business carried on within the United States. Here we recognize that there is a distinction sometimes drawn between the federal government taxing non-residents and a state taxing non-residents, who are citizens of the United States, on account of the "equal privilege and immunities" clause of the Constitution applying to citizens, but not to non-residents of the United States, but it is the position of appellees that in principle the cases are identical, and no distinction as a matter of right can be drawn.

It is usually provided in the treaties between the United States and foreign countries that the citizens thereof shall be accorded all of the privileges and immunities enjoyed by citizens of the United States, and where such treaties exist, it appears to us that the discrimination against the alien would be as real and as much a violation of the treaty rights as is contended by appellant for his client in the instant case.

It is necessary when considering the situs of property to observe the distinction between situs at the domicile of the owner for the purpose of control and management and situs for purposes of taxation. Property may have one situs for busi-

ness purposes, but the state in which it accrues may give it a different situs therein for taxation purposes. This is true as to intangible property, as well as some forms of tangible property. The following from the case of *Adams Express Co.* v. *Auditor*, 166 U. S. 185, 41 L. Ed. 965, is an illustration:

> "The intangible property of the express company, created by the acquisition of franchises or privileges, and the combined use of its tangible property in various states, ih distributed wherever the tanglible property is located and the work is done. Its situs for taxation is not confined to the state by which the company was chartered, or in which its home office is located."

In *Hesler* v. *State*, 128 Md. 228, 97 Atl. 539, the rule is stated as follows:

> "The rule that the situs of personalty, such as mortgages and notes, follows the domicile of the creditor, is not of universal application, even as to a property tax, and gives way to a statute fixing the situs of property for the purpose of taxation, when such statute is constitutional."

In case of *Buck et al., Trustees*, v. *Miller*, 147 Ind. 586, 37 L. R. A. 384, the court says:

> "Personal property used in a business within a state is assessable for taxes even though the owner may claim to be a citizen of and domiciled in another state.

> "Loans and securities retained in a state in the business of buying and selling property, including bonds, stocks, notes and mortgages, and in making loans and investments, collecting and reloaning from year to year, are subject to taxation there, whether the owner is domiciled there or not, and whether the business is conducted by him or by an agent."

One of the chief arguments of appellant is that this property is the product of his skill and ability and superior business judgment, exercised in Chicago; that there is located the central directing thought, which controls the business and which constitutes its chief earning capacity, which, exercised upon the property in Oklahoma, produces the income. That argument is aptly answered in the following quotation from *Adams Express Co.* v. *Auditor*, 166 U. S. 158, 41 L. Ed. 965:

> "Suppose an express company is incorporated to transact business within the limits of a state, and does business only within such limits, and, for the purpose of transacting that business, purchases and holds a few thousands of dollars' worth of horses and wagons, and yet it so meets the wants of the people dwelling in that state, so uses the tangible property which it possesses, so transacts business therein, that its stock becomes in the markets of the state of the actual cash value of hundreds of thousands of dollars. To the owners thereof, for the purposes of income and sale, the cor-

porate property is worth hundreds of thousands of dollars. Does substance of right require that it shall pay taxes only upon the thousands of dollars of tangible property which it possesses? Accumulated wealth will laugh at the crudity of taxing laws which reach only the one, and ignore the other; while they who own tangible property, not organized into a single producing plant, will feel the injustice of a system which so misplaces the burden of taxation.* * * It is suggested that the company may have bonds, stocks, or other investments which produce a part of the value of its capital stock and which have a special situs in other states, or are exempt from taxation. If it has, let it show the fact. Courts deal with things as they are and do not determine rights upon mere possibilities. * * * Where is the situs of this intangible property? * * * Is it simply where its home office is, *where is found the central directing thought which controls the workings of the great machine*, or in the state which gave it its corporate franchise; or *is that intangible property distributed wherever its tangible property is located and its work is done? Clearly, as we think, the latter.* * * * It may be true that the principal officer of the corporation is in New York, and that for certain purposes the maxim of the common law was *Mobilia personam sequuntur*, but that maxim was never of universal application, and seldom interfered with the right of taxation. * * * It would certainly seem a misapplication of the doctrine expressed in that maxim to hold

that by merely transferring its principal office across the river to Jersey City the situs of $12,000,000 of intangible property, for purposes of taxation, was changed from the state of New York to that of New Jersey. * * * In the complex civilization of today a large portion of the wealth of a community consists in intangible property, and there is nothing in the nature of things or in the limitations of the federal Constitution which restrains a state from taxing at its real value such intangible property. Take the simplest illustration: B., a solvent man, purchases from A. certain property, and gives to A. his promise to pay, say $100,000. therefor. Such promise may or may not be evidenced by a note or other written instrument. The property conveyed to B. may or may not be of the value of $100,000. If there be nothing in the way of fraud or misrepresentation to invalidate that transaction, there exists a legal promise on the part of B. to pay A. $100,000. That promise is a part of A.'s property. It is something of value, something on which he will receive cash, and which he can sell in the markets of the community for cash. It is as certainly property, and property of value, as if it were a building or a steamboat, and is as justly subject to taxation. It matters not in what this intangible property consists—whether privileges, corporate franchises, contracts, or obligations. It is enough that it is property which, though intangible, exists, which has value, produces income, and passes current in the markets of the world. To ignore this intangible property, or to

> hold that it is not subject to taxation at its accepted value, is to eliminate from the reach of the taxing power a large portion of the wealth of the country." (Italics ours.)

Considerable attention is devoted to the case of *Pollock* v. *Farmers Loan & Trust Co.*, 158 U. S. 601, 39 L. Ed. 1108, in which the income tax then under discussion was held to be a tax upon the property producing the income. In this connection, we wish to state that this case was decided in 1894, prior to the Sixteenth Amendment to the Federal Constitution, authorizing Congress *"to lay and collect taxes on incomes from whatever source derived."* The purpose of this enactment was to separate the income taxed from the property from which it sprang and to make it, the income, the taxable thing.

> *Brushaker* v. *Union Pac. R. Co.*, 36 Sup. Ct. 236, — L. Ed. —.

It will also be noted that in the Pollock case there were three dissenting opinions, one by Mr. Justice Harlan, one by Mr. Justice Brown, and the other by Mr. Justice Jackson. In the light of the growth of the income tax in recent years, the Pollock decision could not be regarded as authority. Every state, so far as we know, which has an income tax law, has seen fit to not only tax the resident on his income from all sources, but the nonresident upon his income from sources within the

state. In one instance, the residence of the person gives the state jurisdiction over the income derived by that person. In the other case, the location of the property or business within the state gives jurisdiction over the income derived from that source. It is the same principle that gives the courts jurisdiction over a non-resident when he has property situated within the state.

Appellant seeks to press the contention that the income tax is directed against the recipient of the income and not against the property of the recipient. It is directed against the recipient of the income to the same extent, and the same extent only, that an *ad alorem* tax upon property of a non-resident is directed against the owner of the property taxed. All taxes are directed against the person owing the property, or exercising dominion over the thing taxed, in that in the end the tax is paid by the person, whether resident or non-resident. The fact that his property might in some instances be sold and the tax be deducted therefrom does not mean that the tax is not finally paid out of the wealth of the person.

The contention that the provisions of the Oklahoma law show that the tax is intended as a personal tax rather than a tax on the income of the person as such, is answered by the assumption that the Legislature, in passing the act, knew that a strictly personal tax against a non-resident could not be imposed, and it is not to be presumed that a law-making body would attempt to exercise extra-

territorial jurisdiction. The fact that the Legislature levied the tax against only so much of the income of the non-resident as had its source within the state, too clearly shows the legislative intent to require further argument.

In notes to *Commonwealth* v. *Werth*, 116 Va. 604, 82 S. E. 695, it is shown that it is the source of income within the state that constitutes the jurisdictional ground upon which every state, that has attempted to tax the income of non-residents, has based its right to do so. The situs of the physical properties, or the location of the business conducted, determines the situs of the income, and confers the right to levy the tax thereon. In *State* v. *Wis. Tax Commission*, 161 Wis. 111, 152 N. W. 848, as to non-residents, it has been held that the act of 1911 imposes a tax on such part of a non-resident's income *as is derived from sources within the state, or within its jurisdiction*," showing clearly that the expression, "*derived from sources within the state*," and the expression, "*or within its jurisdiction*," are considered identical in meaning. In other words, it follows as a natural consequence that if the sources of the income are located within the state, the right to tax is established. Wherein the courts have said that the income tax "is a burden laid upon the recipient of the income," it has been in an effort to illustrate that the tax is not a tax upon the property producing the income, and was not intended to describe it as a personal tax in the light that it could only

be levied and collected at the domicile of the person, as in case of a poll tax or *per capita* tax.

Appellant quotes from the opinion of Judge Stone, from which this appeal was taken, in which it is said:

> "A tax upon an income of the instant character is directed at neither the person who receives, nor the property from which the income arises, but at the privilege of making, producing, creating, receiving and enjoying the income itself. The right to lay such tax depends upon the protection of the person who receives, or of the business which helps create that income."

The above expression is sought to be construed by appellant to mean that the tax was regarded by Judge Stone as a privilege tax in the sense that the Constitution authorizes the enactment of strictly privilege taxes. That is not what he meant. He meant to say that the protection given by the state to the property rights, and the protection given the business of producing the income, were the basis of the right to tax it in the same sense that it is held that the protection given by a state to physical property authorizes that state to tax it on an *ad valorem* basis when the owner is a non-resident. He did not mean, in other words, that the state conferred a privilege in the sense of a license or permit, as seems to be the construction sought to be given his language by appellant. The theory of *ad valorem* tax against property of a

non-resident is based upon the protection the taxing state affords that property, and that is the sense in which Judge Stone used the above quoted language.

We want to again refer to the case of *Adams Express Co.* v. *Auditor, supra,* in which it is held that the location of the physical property of that corporation was to be looked to in fixing the situs of its intangible property. In principle the same law governs the situs in the instant case.

Appellant next quotes from a large number of cases, holding that the state has no extra-territorial jurisdiction in matters of taxation, to all of which we fully agree. None of those cases hold or touch upon the question of the right of a state to legislatively fix the situs of intangible property produced from tangible property within its jurisdiction.

In *Delaware, Lackawanna & Western R. Co.* v. *Penn.,* 198 U. S. 341, 49 L. Ed. 1077, the right to deduct the value of certain coal from the value of the capital stock of that corporation in Pennsylvania, was upheld on the ground that the coal was outside of the jurisdiction of the State of Pennsylvania, was taxed in a foreign state, and should, therefore, be deducted from the value of the capital of the corporation in Pennsylvania. It will be noticed in this case that the court held that the value of the capital stock of the corporation for taxing purposes in the State of Pennsylvania was construed to mean the value of the physical properties owned by the corporation in that state, as

distinguished from the nominal or authorized capital of the corporation, and that this coal, constituting a part of the physical properties of the corporation, had been removed from the jurisdiction of the taxing state, and should, therefore, be deducted from the value of its capital or physical assets.

In this connection, we refer to case of *Hawley* v. *Malden*, 232 U. S. 11, 58 L. Ed. 477, wherein this court, in discussing the Delaware, Lackawanna case, relied on by appellant (and other cases there cited), shows that they are not applicable to the case at bar in the following language:

> "But these decisions do not involve the question of the taxation of *intangible* personal property (*Union Ref. Transit Co.* v. *Kentucky*, *supra*, p. 211); nor do they apply to tangible personal property, which, although physically outside the state of the owner's domicile, has not acquired an actual situs elsewhere."

In other words, it is clearly shown by the above that the cases relied upon by plaintiff have reference to physical properties which have acquired a situs for taxation in another state, and have no application to intangible property such as income, considered as such.

Among the cases cited under this proposition by appellant is *In re Ashworth*, 7 Upper Can. L. J. 47, decided in 1860. The syllabus reads:

"Where it was made to appear that the appellant, though in the village of St. Thomas at the time of assessment, was there only temporarily for the purpose of winding up the business of an agency of the Bank of Montreal at that place, but that his real place of residence was London, *held*, that he could not be taxed on his income in the village of St. Thomas."

Quoting from the statement of the case:

"It was admitted at the hearing of this appeal that appellant was winding up the business of the Bank of Montreal in St. Thomas as their agent; that he resided in London, had never resided in St. Thomas, and had charge of the Woodstock Agency of the same bank for a like purpose with their St. Thomas Agency."

In other words, the case is in no wise in point, for the reason that it merely holds that they attempted to tax a party who had no interest in the institution sought to be taxed, and that he individually resided in another place and was therefore not taxable. The facts in the case disclose that the party sought to be taxed neither resided at the place nor had property there from which he derived an income.

Another Canadian case is cited by appellant, decided in July, 1864, which holds that the person there sought to be taxed was not taxable for the reason that he had changed his residence and ac-

quired another domicile, and that he was subject to asessment for income tax under the 40th section of the Municipal Assessment Act, at Ingersoll, his permanent residence, and not at Vienna, which had then become his temporary residence. Neither of the Canadian cases cited by appellant decide anything pertinent to the case before the court.

The cases cited by appellant to the effect that personal property of such a nature as to acquire no situs other than that of the owner at his domicile, cannot be taxed by another state, announce no new principle, and we agree fully with the doctrine therein announced, but there is a character of property, personal in its nature, which may be taxed by both the state where the property came into existence and also the state where its owner resides.

As to bank deposits, we read from section 214, Blakemore & Bancroft Inheritance Taxes, as follows:

> "A deposit in a bank in another state is taxable at the domicile of the depositor. Deposits in banks may be also taxable at the place of deposit, irrespective of the physical location of the certificates of deposits themselves, and although the deposit was temporary, for investment only. Our Supreme Court has clearly expressed the theory of such a tax in the following language, where an Illinois decedent left funds in a New York trust company:
>
> " 'If the transfer of the deposit neces-

sarily depends upon and involves the law of New York for its exercise, or, in other words, if the transfer is subject to the power of the State of New York, then New York may subject the transfer to a tax. * * * But it is plain that the transfer does not depend upon the law of New York, not because of any theoretical speculation concerning the whereabouts of the debt, but because of the practical fact of its power over the person of the debtor. What gives the debt validity? Nothing but the fact that the law of the place where the debtor is will make him pay. It does not matter that the law need not be invoked in the particular case. Most of us do not commit crimes, yet we nevertheless are subject to the criminal law, and it affords one of the motives for our conduct. So, again, what enables any other than the very creditor in proper person to collect the debt? The law of the same place To test it, suppose that New York should turn back the current of legislation and extend to debts the rule still applied to slander, that *actio personalis moritur cum persona*, and should provide that all debts hereafter contracted in New York and payable there should be extinguished by the death of either party. Leaving constitutional considerations on one side, it is plain that the right of the foreign creditor would be gone. Power over the person of the debtor confers jurisdiction, we repeat. And this being so, we perceive no better reason for denying the right of New York to impose a succession tax on debts owed by its citizens than upon tangible chattels found within the same state at the

> time of the death. The maxim, '*mobilia sequuntur personam*,' has no more trust in one case than in the other. When logic and the policy of a state conflict with the fiction due to historical tradition, the fiction must give way."

In *Blackstone* v. *Miller*, 188 U. S. 189, 47 L. Ed. 439, it is said:

> "Where a deposit is made in a trust company, where it remains 14 months, while the owner is seeking new investment, a finding is justified that the property was not '*in transitu*' in such a case as to withdraw it from the power of the state."

We merely refer to the above to illustrate that personal property, such as bank deposits, subject to removal at any time by a non-resident, are held to be taxable where the state in which they are deposited seeks to do so. So long as the chose in action, or other personal property sought to be taxed, is not employed in the immediate exercise of an interstate contract or transaction, or so long as it does not interfere with the exercise of a federal instrumentality, it may be taxed by the state where it is found, also by the state where its owner resides, if both states see fit to exercise their right.

As a further evidence that the state taxes the income before its situs is moved, the income tax law fixes a lien upon all of the property, personal and real, of the delinquent taxpayer, which, being

a matter of law, imparts notice to every person dealing with the producer of the income, and which evinces a clear design on the part of the Legislature to tax it at its source. Appellant says if a non-resident lawyer were to come into the state from Joplin, Missouri, and make more money by practicing here than is exempted by our statute, that he would not be subject to the income tax for the reason that the situs of such income is in Joplin, where his office is located. A condition might arise whereby a person residing out of the state could transact business within the state, and not subject himself to the income tax, even making more than the law exempts, for the reason that there might be no way to enforce collection, if there were no property in this state belonging to the party owing the tax, but we do not concede if a lawyer residing without Oklahoma were to practice his profession within the state and made an income greater than is exempt to him, that he would not be subject to the income tax law, and if any property belonging to him were found in the state, the tax could be enforced against him.

Attention is directed to the case of *City of N. O.* v. *Stemple*, 175 U. S. 309, 44 L. Ed. 174, in which Justice Brewer announced the law as follows:

> "Moneys collected as interest and principal of notes, mortgages and other securities, kept within the state for use or reinvestment, though the owner is domiciled

> in another state, and the moneys are deposited in a bank to his credit, are subject to taxation under Louisiana Acts 1890, Ch. 106, providing for taxation of credits arising from business done in the state, at the business domicile of a non-resident owner, his agent or representative.
>
> "Notes and mortgages, the owner of which is domiciled in another state, when they are kept within the state by an agent, may be subjected to taxation by the laws of the state in which they are held."

This holding is based upon the fact that under the taxing system of Louisiana, its Legislature expressed the intention of taxing credits and deposits belonging to non-residents of the state. It was argued and insisted on behalf of the taxpayer that the credits were debts, and that debts have their situs at the domicile of the creditor. In discussing the case, Mr. Justice Brewer said:

> "When the question is whether property is exempt from taxation, and that exemption depends alone on a true construction of a statute of the state, the federal courts should be slow to declare an exemption in advance of any decision by the courts of the state. The rule in such a case is that the federal courts follow the construction placed upon the statute by the state courts, and in advance of such construction they should not declare property beyond the scope of the statute and exempt from taxation unless it is clear that such is the fact. In other

words, they should not release any property within the state from its liability to state taxation unless it is obvious that the statutes of the state warrant such exemption, or unless the mandates of the Federal Constitution compel it. If we look to the decisions of other states, we find the frequent ruling that when an indebtedness has taken a concrete form and become evidenced by note, bill or mortgage, or other written instrument, and that written instrument evidencing the indebtedness is left within the state in the hands of an agent of the nonresident owner, to be by him used for the purposes of collection and deposit or reinvestment within the state, its taxable situs is in the state. See *Catlin* v. *Hull*, 21 Vt. 152, in which the rule was thus announced (pages 159, 161):

" 'It is undoubtedly true that, by the generally acknowledged principles of pubilc law, personal chattels follow the person of the owner, and that, upon his death, they are to be distributed according to the law of his domicile; and, in general, any conveyance of chattels, good by the law of his own domicile, will be good elsewhere. But this rule is merely a legal fiction adopted from considerations of general convenience and policy for the benefit of commerce and to enable persons to dispose of their property, at their decease, agreeable to their wishes, without their being embarrassed by their want of knowledge in relation to the laws of the country where the same is situated. But even this doctrine is to be received and

understood with this limitation, that there is no positive law of the country where the property is in fact, which contravenes the law of his domicile; for if there is, the law of the owner's domicile must yield to the law of the state where the property is in fact situate. * * * We are not only satisfied that this method of taxation is well founded in principle upon authority, but we think it entirely just and equitable, that if persons residing abroad bring their property and invest it in this state, for the purpose of deriving profit from its use and employment here, and thus avail themselves of the benefits and advantages of our laws for the protection of their property, their property should yield its due proportion towards the support of the government which thus protects it.' "

State Affords Protection to Non-Residents.

Another reason assigned by appellant why the state cannot tax his income is that it does not afford him any protection, and that he can exercise all the rights in spite of the State of Oklahoma that he exercises with its consent. The state affords him the services of its recording laws under which his titles may be placed of record. It affords him its courts in which to enforce his rights as to contracts made for drilling, producing oil, the laying of pipelines, and the acquiring of right of way therefor. The advantages running to him as a result of the laws of the state in which his business

is conducted are maniflod. These are the agencies referred to by the courts when they say that it is the protection afforded by the state to the party making the income that entitles the state to tax. It is not in the sense of a license or special privilege granted, as is the case with corporations licensed to do business in a state other than that of their original charter.

Inheritance Taxation Compared to Income Taxation.

Appellant next devotes attention to an effort to distinguish between the principle upon which inheritance taxes are based and that governing the assessment of income tax. It is announced by the courts as one reason why inheritance taxes may be collected from non-residents that it is due to the grace of the state in allowing them to inherit at all, and that, if so disposed, the state could escheat the entire estate of one who died leaving property in a state other than that of his residence. That reason has been assigned by many courts as a basis for the jurisdiction to levy the inheritance tax; but after a state has passed a descent and distribution law, which provides that upon the death of the owner of property within that state it shall descend to his heirs in a given proportion, that state has then parted with its special right to take from the estate so inherited any portion thereof. In other

words, after a state has granted the right of inheritance, without reserving in such act a portion of the estate in the form of taxes, or to be escheated, as compensation for the protection afforded the estate, then it is on the same basis as any other property owned by non-residents. The power to tax after vesting a complete title in the heirs would seem to us to be no more justified in the inheritance tax case than in any other tax case where a non-resident has been afforded protection to his property by the laws of the state in which the property was situated.

Jurisdiction of Federal Government Over Incomes of Aliens Compared to That of States Over Non-Residents.

Appellant says there is a wide distinction between the power of the federal government and the power of the state in matters of taxation; and that there is a vast distinction between the right of the federal government as against aliens and the right of the state as against a citizen of another state; that the federal government can prevent aliens from coming to this country and may deport them after they come.

Appellant further says the government has complete control, jurisdiction and authority over the property and business of a non-resident, and can and does collect the income from his business

at its source. We do not disagree as to the above statement, but wish to inquire whence this authority? Wherein does it differ in point of sovereignty to the like authority and sovereignty of the several states, except insofar as the Constitution abridges the same by requiring the same privileges and immunities to a citizen of the United States as those enjoyed by citizens of the several states? The right to tax the income at its source by the federal government is based upon the fact that the federal government regards the source of the income as determining the situs of the income—otherwise, the federal government is exercising extraterritorial jurisdiction without authority of law. In other words, is confiscating property without color of right.

Section 388, 6 R. C. L., is as follows:

> "The guarantees of the Fourteenth Amendment as to the equal protection of the laws are universal in their application to all persons within the territorial jurisdiction, including aliens, without regard to any difference of race, color or nationality. Hence it has been held that a statute imposing a tax on employers of foreign born, unnaturalized male persons for each day that each of said persons may be employed, and authorizing the deduction of that sum from the wages of such employees, was unconstitutional as depriving the latter of the equal protection of the laws, and the same is true as to laws denying to aliens the right to obtain licenses to pursue ordinary callings such

> as that of a barber; but peddling has been considered as presenting so much opportunity for fraud as to make it a proper subject for regulation, and to authorize the Legislature to refuse peddler's licenses. Though this distinction as to peddlers is not always recognized. The right to the equal protection of the laws, however, does not give to aliens the right to participate in the administration of the laws, or to hold public offices, or to discharge any duties of public trust."

The "equal protection" clause of the Constitution was never designed for the purpose of determining jurisdictional rights or defining the extent of sovereignty, but simply served the office of requiring equal treatment after the basic principles of jurisdiction and sovereignty have been established from independent sources.

Oklahoma Law Does Not Discriminate Against Non-Residents.

In considering this phase of the case, let it be understood that no iron-clad rule of equality is required to be adopted by the states, and that minor discriminations, which are the result of practical application of tax laws, that are uniform so far as the jurisdiction of the state extends, are not to be held invalid on account of such discriminations. There are a great many discriminations in the mat-

ter of administration of tax laws, which cannot be avoided owing to the impossibility of adapting such laws our dual form of government. No tax law operates with equal force in every particular against residents and non-residents, for the reason that in one instance there is both personal and property jurisdiction invoked, and in the second instance only property jurisdiction can be invoked by the state.

Mr. Black, in his work on Income Taxes, section 200, quoting a decision of this court, sustaining the Income Tax Law of the Territory of Hawaii, says:

> "We think that we are safe in saying that the Fourteenth Amendment was not intended to compel the states to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the states, whose object is to secure equality of taxation and which are usually accompanied with qualifications deemed material, but it would render nugatory those discriminations which the best interests of society require, which are necessary for the encouragement of needed and useful industries and the discouragement of intemperance and vice, and which every state, in one form or another, deem it expedient to adopt. * * * There is no general supervision on the part of the nation over state taxation, and in respect to the latter, the state has, speaking generally, the freedom of a sovereign, both as to the ob-

> jects and methods. It was well said in the opinion of the circuit court in this case that there can at this time be no question, after the frequent and uniform expressions of the Federal Supreme Court, that it was not designed by the Fourteenth Amendment to the Constitution to prevent a state from changing its system of taxation in all proper and reasonable ways, nor to compel the states to adopt an iron-clad rule of equality, to prevent the classification of property for purposes of taxation, or the imposition of different rates upon different classes. It is enough that there is no discrimination in favor of one as against another of the same class, and the method for the assessment and collection of the tax is not inconsistent with natural justice."

When a state, in adopting a system of taxation, has applied the same measure to both the resident and non-resident, insofar as its jurisdiction extends, then the requirements of the Fourteenth Amendment have been satisfied. The Oklahoma law does this, and is as follows:

> "Each and every person in this state shall be liable to an annual tax upon the entire net income of such person, arising or accruing from all sources during the preceding calendar year, and a like tax shall be levied, assessed, collected and paid annually upon the entire net income from all property owned and of every business, trade or profession carried on in this state by persons residing elsewhere."

Under the terms of this section, the state taxes the income of the non-resident produced from property owned, or business conducted within the state, and allows him to deduct all of the losses and expenses incident to the making of such income within the state. It does not allow him to deduct losses incurred in business without the state, but it does not tax him on income derived from without the state. Taking the state as the taxing unit, and not looking beyond its boundaries for conditions over which it has no control, it has meted equal justice to the non-resident and the resident.

If the law discriminates in any event, it is against the resident, and in favor of the non-resident, in that it taxes the resident upon all his income derived from all sources. The same exemptions are allowed a non-resident as are allowed a resident. He is entitled to the same deductions within the state. The resident is entitled to deduct all of his losses from his business everywhere, and is required to pay taxes upon his income from business everywhere. The non-resident is only taxed upon his income in the state, and is only allowed to deduct losses incurred within the state.

We are not, in this respect, unmindful of the fact that a non-resident, by incurring losses outside of the state, and making gains upon his business within the state, might be required to pay a larger tax in proportion to his whole net income than the resident of the state who makes money within the state and loses money outside the state. But it is to be presumed that business interests in the sev-

eral states will equalize as to gains and losses. Laws are not enacted on the theory that business men are going to fail and sustain losses, but on the other hand, it is presumed that every man is going to make an income on his business enterprises in whatever states he may operate. The possibility of isolated cases where individuals may be placed in a situation which would result in a discrimination when applied to the law does not afford a sufficient reason to strike down the law.

In the opinion rendered in the case of *Travelers Ins. Co.* v. *Conn.*, 185 U. S. 364, 46 L. Ed. 949, Mr. Justice BREWER, in discussing the rights of non-residents to the same deductions as residents, who contribute in other respects to the general expenses and upkeep of the state government, has this to say:

> "No unconstitutional discrimination against non-resident stockholders in domestic corporations is made by Conn. Pub. Acts., 1897, chapter 153, section 2, providing for the assessment of such stock at its market value, with no deduction on account of real estate by the corporation, although provision for such reduction in assessing resident stockholders, is made by the Conn. Gen. Stat., section 3836, as amended by Pub. Acts., 1889, chapter 63, since non-resident stockholders pay no local taxes, but simply constitute so much to the general expenses of the state, while the resident stockholders pay no tax to the state, but only to the municipality in which they reside."

From the body of the opinion, we quote the following:

> "Absolute equality in taxation can never be attained. The system is best which comes the nearest to it. The same rules cannot be applied to the listing and valuation of all kinds of property. Railroads, banks, partnerships, manufacturing associations, telephone companies, and each of the numerous agencies of business, which inventions of the age are constantly bringing into existence, require different machinery for their taxation. The object should be to place the burden so that it will bear as nearly as possible equally upon all. For this purpose, different systems adjusted with reference to the valuation of different kinds of property are adopted. The courts permit this."

In *State Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 673:

> "Perfect equality and perfect uniformity of taxation as regards individuals or corporations, or different classes of property, subject to taxation is a dream unrealized. It may be admitted that the system which most nearly attains this is the best. But the most complete system which can be devised, when we consider the immense variety of subjects which it necessarily embraces, must be imperfect. And when we come to its application to the property of all the citizens, and of those who are not citizens, in all the localities of a large state like Illinois, the application being made by men whose judgments and opinions vary, as they are

affected by all the circumstances brought to bear upon the individual, the result must inevitably partake largely of the imperfection of human nature and of the evidence of which human judgment is founded."

We next quote from the case of *Bell's Gap R. Co.* v. *Com. Pa.* 134 U. S. 232, 33 L. Ed. 892:

> "But, be this as it may, the law does not make any discrimination in this regard which the state is not competent to make. All corporate securities are subject to the same regulations. The provision in the Fourteenth Amendment that no state shall deny to any person within its jurisdiction the equal protection of the laws was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. * * * The general proposition and scope of the Fourteenth Amendment, and the general qualifications necessary to be applied to it, are well stated in *Barbier* v. *Connolly*, 113 U. S. 27, 28 L. Ed. 923. Mr. Justice FIELD, in delivering the opinion of the court, there said: 'That the Fourteenth Amendment, in declaring that "no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoilation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment

of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and their property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition; and that in the administration of criminal justice, no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes called the police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. With due regard to these considerations, we are clearly of the opinion that the method of assessing the tax in question on the face value of corporate securities in Pennsylvania, is not violative of the Fourteenth Amendment to the Constitution."

In this case a tax was arbitrarily placed upon the nominal or face value of corporate stocks as to non-residents, regardless of their actual value,

while as to residents, the actual value was made the basis by allowing them to deduct therefrom real estate otherwise taxed. The court held this not to be a discrimination purely upon the ground that the presumption was that the face value of the stocks held by the non-residents expressed their actual value, which, in the light of experience, everyone knows to be purely fiction.

Appellant refers to the Wisconsin Income Tax Law with a view of showing that the Supreme Court of Wisconsin has intimated some doubt as to its validity in that it may discriminate against non-residents. We disagree with appellant in construing the language of that court, but granting he is correct, we call attention to the difference between the Wisconsin law and the Oklahoma law. The Wisconsin statute specifically denies exemptions to non-residents that it allows to residents. The Oklahoma statute does not do so. The only instance in which the Oklahoma law might be construed to allow deductions to the resident, which are not allowed a non-resident, would be an individual situation of a non-resident in a given case. On this point we cite Ohio Tax Cases, 232 U. S. 576, 58 L. Ed. 737, wherein this court, in the first paragraph of the syllabus, says:

> "The law imposing a tax on privileges and franchises is not repugnant to the Ohio Constitution, as being confiscatory and oppressive, merely because in isolated cases such law may impose a hardship."

Applying the same rule, the state law could not be said to discriminate against a non-resident, because in some individual or isolated case it might under extraordinary circumstances impose a hardship. The Wisconsin statute expressly denies to all non-residents the specific exemptions allowed residents. Section 1087 M-5 chapter 658 of the Wisconsin Laws 1911, after providing for exemptions to residents, contains this language: "That these exemptions do not apply to non-residents."

To illustrate the deductions allowed under the Oklahoma law, we include herein the following figures from the report of Mr. Shaffer in the instant case:

FIRST: The gross income derived from his business carried on in Oklahoma	$3,820,164.16
—from which amount he is allowed deductions under the Oklahoma statute of.................	2,257,516.20
—leaving a net taxable income of only	$1,562,647.98

The deductions include:

FIRST: Family exemption to the amount of	$ 4,300.00
SECOND: Amount of necessary expenses actually paid within the calendar year in carrying on the business	1,601.380.39

THIRD: Taxes paid 125,500.88

FOURTH: Exhaustion, wear and tear of property..................... 530,634.93
—making a total deduction of....$2,261,816.20

In the case of *People* v. *Barker*, 141 N. Y. 586, 23 L. R. A. 95, in the opinion of Mr. Justice PECKHAM, it was held that non-residents of New York, having property invested and doing business in New York, were not discriminated against, because they were not allowed to deduct their indebtedness as residents were allowed to deduct indebtedness from their property. The opinion in part reads:

> "Prior to 1855, great numbers of persons doing business in this state, and having large amounts of moneys invested within its borders, nevertheless chose to reside just outside its confines. Although these persons were non-residents of the state, yet they came daily within its boundaries for the purpose of doing business here, and had here large amounts of capital invested in their business; and yet, under our laws, they could not be reached for taxation. Their names could not be put upon an assessment roll, because they did not reside in any town or ward where an assessment could be made; and they had no agents or trustees who resided in the state, against whom any assessment on account of such property could be made. To reach the non-resident for the purpose of subjecting such property to taxation was the object of the act, chapter 37, of

the laws of 1855. *People* v. *Tax Commissioners*, 23 N. Y. 224, section 1 of the act, reads as follows: 'All persons and associations doing business in the State of New York as merchants, bankers or otherwise, either as principals or partners, whether special or otherwise, and not residents of this state, shall be assessed and taxed on all sums invested in any manner in said business, the same as if they were residents of this state, and said taxes shall be collected from the property of the firms, persons or associations to which they severally belong.' We are of the opinion that this act does not contemplate the deduction of debts from the sums invested in this state by non-residents. As the person is a non-resident, it is to be assumed that he will, at the place of his domicile, have all of what might be termed his 'equities' adjusted. and that if entitled to it anywhere, it will be at such domicile, that he will claim and be allowed the right to have such deduction. In his case, the Statute of 1855 seizes upon the certain specific sum which he has here invested in the business carried on by him, and that sum it to be assessed and taxed the same as if the person were a resident of the state. In using the expression, 'the same as if they were residents of this state,' we do not think it was intended that exceptions were to be allowed here the same as if the party were a resident, or that deductions from the sum thus invested should be made as if that were the case. It meant, as it seems to us, that the sum invested in any manner in business in this state should be assessed in the same manner and form as a resident would be

assessed. Foreign corporations are included within the terms of the Act of 1855. *British Commercial L. Ins. Co.* v. *Tax Commissioners*, 1 Keyes 303, cited in *People* v. *McLean*, 80 N. Y. 254, 259. Hence it was said that a foreign corporation doing business in New York was properly taxable in the City of New York, where its principal place of business or office of the agency existed. And in this last cited case, in 80 N. Y., it is said that the Act of 1855 points out the mode of taxation, viz: 'the same as if they were residents of this state'; and in referring to the mode of taxing a resident corporation, it is found that it is to be taxed in the town or ward where it has a principal office or place for the transaction of its financial concerns. The foreign corporation is not to be taxed in all things the same as if it were a resident, because the statute expressly provides that it is only to be taxed for the sum invested in business in this state, and, in order to tax it upon that sum no indebtedness should be allowed. The percentage, the form, the mode of the assessment and taxation upon the specific sum invested in business in this state are to be the same as if the person were a resident; but inasmuch as all the subjects of assessment against a non-resident are not within the jurisdiction of the state, but only the sum here invested, it is plain that it was never contemplated by the Legislature that such non-resident should have the right to make deductions from the sum by reason of debts, while the taxing authorities would have no right to balance such deductions by an assessment of other

property of the non-resident not situated within the state. The resident had no right to deduct his indebtedness from any specific piece of personal property, or from any special chose in action. In a general way, it may be said that he is to be charged with all his personal property, and from that total he may deduct his debts. This cannot be done in the case of a non-resident, although it may (as we may assume) be done at his demicile. All we are to do is to assess and tax the sum here invested; and the equities must, as we have said, be adjusted at the domicile of the person."

The above case is parallel in the principle announced in the instant case, granting, for the sake of argument (which we do not do in point of fact), that the Oklahoma law does work a discrimination against non-residents in regard to deductions.

We next quote from 37 Cyc. 1005, as follows:

"In several states, a taxpayer is allowed to deduct his *bona fide* indebtedness from the amount of his taxable personal property; and an assessment is void if made without allowing such deduction when properly claimed by a person entitled to it. But generally, where a person owns property in several places, the deduction is to be allowed only at the place of his domicile, and hence cannot be claimed by non-residents."

As illustrations of the justice of the principle of taxing the income of persons residing without a

jurisdiction, but transacting business within the jurisdiction, we cite the following cases:

"The appellants, a firm of wine merchants, resided and carried on business at Bordeaux. The senior partner was in the habit of spending about four months every year at different times in England, living during that time chiefly in London, and then always at a hotel. When here he saw customers and took orders from retail wine merchants and others. A firm of London wine merchants acted as the appellants' agents, and a room, the rent of which was paid by the appellants, was provided in their office for the senior partner's use. The appellants employed and paid their own clerk, and had their name painted upon the premises. The wine ordered and sold was shipped by the appellants from Bordeaux, from which place they forwarded bills of lading and invoices, sometimes to the purchasers direct, sometimes to the agents. Payment for the wines ordered was made to the agents, who collected all the accounts, received checks and moneys, and transacted all the necessary business not personally transacted by the senior partner in England. The agents were not paid a salary, but received a commission on all wines sold in England, or ordered through the senior partner. This commission covered all expenses attaching to the appellants' business in England, and included a guaranty of all debts for the appellants' wine sold in England: *Held*, that the appellants, although not resident within the United Kingdom,

exercised a trade in the United Kingdom, and were chargeable to income taxes under Schedule D in respect thereto. *Tischler & Co.* v. *Apthorpe* (1885), 52 Lt. 814, 33 W. R. 548, 49 J. P. 372, 2 Tax Cas. 89."

Dowell's Income Tax Laws (7th Ed.), 449.

"A company incorporated and registered in Christiania, Norway, where its registered office was, its share list and books were kept, and where the shareholders' meetings were held, owned a shop. The two managers were resident in Norway, one of whom acted as director of the management. The chartering and all voyage receipts and disbursements were dealt with by Messrs. Wingate & Co., a firm resident in Glasgow, who received and retained all funds until required for payment of expenses or dividends: *Held*, that the company was not resident within the United Kingdom, but that it exercised trade within the Kingdom for the profits of which the Glasgow firm, as its agents, were assessable to income tax." *Wingate* v. *Webber* (1897), 34 Sc. L. R. 699, 3 Tax Cas. 569.

Dowell's Income Tax Laws (7th ed.), 450.

History of Income Taxation.

It will be illuminating to review the history of income tax legislation in the United States, as set out in the opinion of Judge Stone in the instant

case. After discussing the theory of income taxation, Judge STONE reviews its history as follows, showing that every act has been passed with the view that the right existed to tax nonresidents upon the income from their business operated within the taxing jurisdiction without discrimination in favor of its own citizens:

> "In addition to the above theory of taxation and public policy considerations there is another thought which, while not controlling, has a persuasive force. That is the history of our national income laws. Our first income tax law sprang from the early exigencies of the Civil War. The Act of August 5, 1861 (12 St. 292, 309, section 49) taxed incomes of residents and those derived from property in United States belonging to citizens of United States residing abroad. That of July, 1862 (12 St. 432, section 84), provides for tax on gross receipts for insurance premiums 'and like duty shall be paid by the agent of any foreign insurance company having an office or doing business in the United States.' The Act of June 30, 1864 (13 St. 223, sections 105, 116), followed the two preceding laws. The Act of July 4, 1864 (13 St. 417, section 116), continued the tax as to resident and non-resident citizens. The Act of July 13, 1866 (14 St. 98, section 9), amended section 116 *supra*, 'and a like tax shall be levied, collected and paid annually upon the gains, profits and income of every business, trade or profession carried on in the United States by persons residing without the United

States not citizens thereof.' This act also amended section 122 of the June 30, 1864, act, which taxed bond coupons, interest and dividends of railroads, canals, turnpike, etc., companies by inserting as to bond or stockholders the words 'including non-residents, whether citizens or aliens.' The Act of March 2, 1867 (14 St. 471, 477, section 13), followed section 166 *supra*, as amended, 'and a like tax shall be levied, collected and paid annually upon the gains, profits and incomes of every business, trade or profession carried on in the United States, by persons residing without the United States, and not citizens thereof.' The Act of July 14, 1870 (16 St. 256, 257, section 6), covered incomes of residents, non-resident citizens, 'any business, trade or profession carried on in the United States by any person residing without the United States, and not a citizen thereof,' and 'rents of real estate within the United States owned by any person residing without the United States and not a citizen thereof.' Section 15 of this act provided for a tax on coupons, interest and dividends 'to whatsoever person the same may be due, including non-residents, whether citizens or aliens.' There followed an *hiatus* in this sort of taxation until the Act of August 28, 1894 (28 St. 509), which provided (section 27) for a tax on incomes of citizens, whether resident or non-resident, and on 'all property owned and of every business, trade or profession carried on in the United States by persons residing without the United States.' Section 31 provides that 'any non-resident' may have benefit of certain exemptions by

filing tax statements and: 'In computing income he shall include all income from every source, but unless he be a citizen of the United States he shall only pay on that part of the income which is derived from any source in the United States. Non-resident corporations under same liability as resident.' The Act of August 5, 1909 (36 St. 112, section 38), covers income of corporations, 'or if organized under the laws of any foreign country, upon the amount of net income over and above five thousand dollars received by it from business transacted and capital invested within the United States and its territories.' The Act of October 3, 1913, taxed incomes of citizens (resident or non-resident) of residents and from property, business, etc., in United States of non residents (not citizens). The Act of September 8, 1916 (39 St., Part 1, page 756, section (a)), imposes such tax on the income of citizens and of residents of the United States and upon income received 'from all sources within the United States by every individual, a non-resident alien.' The Act of October 3, 1917, continues the tax of the Act of 1916, increasing it as to some classes, and by section 200, defining the terms used in connection with War Excess Profits Tax, provides that, 'the term "net income" means in the case of a foreign corporation or partnership or a non-resident alien individual the net income received from sources within the United States.' While some of the above references go outside of income taxes, such exceptions are illustrations in kindred fields. And all show

an unbroken legislative policy (beginning with the Act of July 3, 1866, and extending through the Act of 1917) to tax the incomes of non-resident aliens insofar as derived from sources within the United States. There has been but one judicial challenge of this asserted right. In *Railroad Co.* v. *Jackson*, 7 Wall. 262, although the validity of the income tax law of June 30, 1864, was questioned, insofar as reduction of interest was concerned, by a non-resident alien railroad bondholder, the court held that the act under consideration did not include such a person within its terms, saying:

" 'It is not important, however, to pursue the argument, as Congress has since, in express terms, by the Acts of March 10 and July 13, 1866, imposed a tax on alien non-resident bondholders. The question hereafter will be not whether the laws embrace the alien non-resident holder, but whether it is competent for Congress to impose it; upon which we express no opinion.'

"Mr. Justice CLIFFORD (Mr. Justice SWAYNE concurring) dissented, saying:

" 'I dissent from the opinion and judgment of the court in this case, because I think the taxes in question, both State and Federal, were legally assessed, and that the officers of the railway company properly deducted the same from the amount of the coupons described in the declaration.'

"So that, as far as there has been any expression upon the validity of such provisions, they have been approved. There is

no reason why the *situs* of an income is any different when the tax is national instead of state. The relative positions of the non-resident alien and the state non-resident are, in this respect, identical. If the income is, for taxation purposes, only where the recipient resides, then the United States can no more tax the income of a non-resident alien than a state can that of a non-resident. There is common to both the same reason that no sovereignty can properly tax something not within its jurisdiction in the sense of not being under its protection. As said by Chief Justice MARSHALL in *McCullock* v. *Maryland*, 4 Wheat. 316, 429, in speaking of the state power of taxation:

" 'It may be exercised upon every object brought within its jurisdiction. This is true. But to what source do we trace this right? It is obvious that it is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a state extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident.'

"It is inconceivable that the National Government would, under the guise of taxation, practice what, without *situs* and power, would, in the language of Justice BROWN, amount to extortion. (*Union Transit Co.* v. *Kentucky*, 199 U. S. 194, 202.) This history of the long assertion and acceptation of the power in a government to tax an income

produced in or arising from sources within its jurisdiction, though such income belong to one foreign in citizenship and residence, is strongly persuasive of its existence. As said by Chief Justice MARSHALL in the case just quoted (page 401), in speaking of the long unchallenged legislation concerning the old National Bank: 'An exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.' And as said by Justice CHASE in considering whether a tax upon carriages was a direct tax within the constitution (*Hylton* v. *U. S.*, 3 Dall. 171):

" 'The deliberate decision of the national legislature (who did not consider a tax on carriages a direct tax, but thought it was within the description of a duty) would determine me, if the case was doubtful, to receive the construction of the legislature.'

"To this national history may be added the fact that in every state income tax which has been brought to our attention there is the same provision levying on non-resident incomes from sources within the state: Hawaii (Laws April 30, 1901, section 1); Missouri (Laws 1917, page 524, section 1); South Carolina (Civil Code, 1912, volume 1, page 130, section 354), and Wisconsin (Laws 1911, chapter 658, section 3).

"In what has been said above in reference to the character of an income tax being in the nature of an excise or privilege levy, the two decisions in the case of *Pollock* v.

Farmers Loan & Trust Company (157 U. S. 429 and 158 U. S. 601), have not been overlooked. That case determined that income taxes from real estate ('rents, or products, or otherwise') and from personal property ('bonds, stocks, or other forms of personal property') was a direct tax within the meaning of the national constitution, and that such a tax upon municipal bonds was invalid 'because of want of power to tax the source.' The facts of the present case place it without the three classes included in that decision. This income is derived from the prosecution of an oil business consisting of the mining, production and marketing of oil under a least for that purpose. If it is not so excluded, then under that decision there could be no question of the right to tax, for although the question in that case was, in this respect, as to the meaning of constitutional terms, yet its determination turned on the identity or close relation between the income and the property which produced it (158 U. S., at 629). Viewing this case as without the decision of that case, yet there are expressions therein which seem to sustain the theory that the tax upon this income is a privilege tax, and within the rule of *Springer* v. *U. S.*, 102 U. S. 586. In the latter the opinion the court (158 U. S. 635) says:

" 'We have considered the act only in respect of the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from busi-

ness, privileges or employments, in view of the instances in which taxation on business, privileges or employments has assumed the guise of an excise tax and been sustained as such.'

"In the earlier opinion (157 U. S., at 578), in commenting on the Springer case, the court says:

" 'The original record discloses that the income was not derived in any degree from real estate, but was in part professional as attorney at law and the rest interest on United States bonds. It would seem probable that the court did not feel called upon to advert to the distinction between the latter and the former source of income, as the validity of the tax as to either would sustain the action.'

"The opinion thus concludes: 'Our conclusions are that direct taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate; and that the tax of which the plaintiff in error complains is within the category of an excise or duty.'

"While this language is broad enough to cover the interest as well as the professional earnings, the case would have been more significant as a precedent if the distinction had been brought out in the report and commented on in arriving at judgment for a tax on professional receipts might be treated as an excise or duty, and therefore indirect, when a tax on the income of personalty might be held to be direct."

After reciting the history of income tax legislation, national and state, Judge STONE draws the following conclusion:

> "The conclusion, therefore, is that the state had jurisdiction to levy an income tax against a non-resident upon that portion of an income of this character derived from sources within the state."

In the case of *Armour & Co.* v. *Com. of Va.*, decided March 4, 1918, U. S. Adv. Ops. 1917, page 351, it is said in paragraph 1 of the syllabus:

> "A statute imposing an annual license fee upon all persons or corporations carrying on a merchandise business in the state, the amount of which is determined by the sum of the merchant's purchases during the year, is not, because of its exclusion of 'manufacturers' taxed on capital by the state, who offer for sale at the place of manufacture, goods, wares and merchandise manufactured by them,' violative of the constitutional guaranties of privilege and immunities contained in section 2, article 4 of the United States Constitution and the Fourteenth Amendment thereto, or of the equal protection clause of the Fourteenth Amendment."

Instant Tax Is Not a Burden on Interstate Commerce.

Appellant is of the opinion that to sustain the tax in the instant case would be a calamity, as stated at page 81 of his brief, and would be an intolerable burden on interstate commerce. It could be no burden on interstate commerce for the reason that when the income tax is levied for a given year, the party taxed has consummated all acts of commerce for that year, and it has been determined that as a result thereof, he has acquired an income therefrom over and above the exempted amount. When this state of facts exists, it cannot be said to be a burden upon interstate commerce. If the law is such that a man, by exploiting the resources of a new state such as Oklahoma, reaping the gains of a gigantic industry, amounting to millions of dollars per year, can, by withholding his residence from the state, avoid paying a tax on this immense income, we may well paraphrase the language of this court in the case of *Adams Express Co., supra, that accumulated wealth will laugh at the crudity of such a system which taxes a resident, but not the non-resident, while the resident will feel the injustice of a system which so misplaces the burden of taxation.*

Quoting from 12 *Corpus Juris*, page 114, section 160, the rule as to income tax being a burden on interstate commerce is stated as follows:

> "A state statute imposing a tax on incomes from business within the state, although involving interstate transactions, does not violate the commerce clause of the Federal Constitution."

See also *U. S. Glue Co.* v. *Oak Creek*, 161 Wis. 211, 153 N. W. 241.

In the case of *Armour & Co.* v. *Com. of Va., supra*, it is said in paragraph 2 of the syllabus:

> "No unawful burden upon interstate commerce is imposed by statute which imposes an annual license tax upon all persons or corporations carrying on a merchandise business in the state, the amount of which is determined by the sum of the merchant's purchases during the year, but which excludes from its operation 'manufacturers taxed on capital by the state, who offer for sale at price of manufacture, goods, wares and merchandise manufactured by them'; and this whether the statute be considered from the point of view of the power of the state to enact it, inherently considered, or of the power tested by the necessary operation and effect of the statute, if any, upon interstate commerce and the plenary and exclusive power of Congress to regulate the same."

The Element of Business Skill and Energy of Taxpayer.

The only answer we deem necessary to appellant's argument under this head is that business ability and skill have never been taken into account by tax laws, for the well founded reason that no property acquired or wealth produced is the result of other than business skill and ability. It enters into the production of wealth in every detail, and is as essential to the ownership and management of property as the use of water is essential to life. The element of skill and ability enters into the proper conduct of a farm situated in Oklahoma and owned by a non-resident, or the breeding and marketing of cattle owned by a non-resident ranchman of the state, yet it would not be contended that the income of the latter class could not be taxed for the reason that an inseparable component part thereof was the result of the superior intellect of the non-resident owning the farm or the cattle ranch.

Tax Lien on Appellant's Property Violates No Fundamental Right.

Appellant contends that the state has no right to fix a lien upon any property other than the property tax (the income), and cites as authority therefor the case of *Dewey* v. *City of Des Moines*, 173

U. S. 193, 35 L. Ed. 665. The case cited is one in which the City of Des Moines was seeking to enforce personal liability against a non-resident owner of lots in said city. The assessments were for improvements upon a street upon which the lots abutted. It is stated in the opinion that the expenses were greater than the benefits received by the lots by virtue of the improvements. The statute under which the assessment was made, section 478, Code of Iowa, provides that the assessment shall be a lien upon the respective lots from the time of assessment, which, of course, means it shall be a lien upon the lots abutting the improvement district or street and those lots only. The court simply held in that case that the owner, being a non-resident, was not subject to personal liability for payment of the tax, and that, therefore, they could not resort to property other than the property benefited by the improvements and upon which the statute fixed a lien.

The theory of local improvement taxes is that the property abutting the improvements is thereby enhanced in value, and is, by virtue of the benefits to the property, subject to a tax.

The income tax differs from the above, in that it is not a tax upon any specific property other than the income itself, and a lien is fixed upon all the property owned by the non-resident, which is located in the state, to secure the payment of the income tax, to the same extent as a lien obtains upon property which is exempt from taxation, to secure

ad valorem taxes due from a non-resident upon other property which is taxable. The same principle governs as a lien fixed upon the entire share of an heir's estate of a decedent to secure the payment of the transfer of inheritance tax, which is not a tax upon the assets of the estate as such, but a tax upon the transfer thereof.

Judge STONE, in his opinion in the instant case, aptly answers that contention when he says:

> "The provision of the law creating a lien upon all the property in the state is not subject to attack. It does not pretend to create a personal liability, and the lien is no broader than the tax, which is based upon the income from all the property, business, etc., in the state."

It is a well settled principle that the state's system of *collection* of taxes will not be disturbed as violating any fundamental rights *when the tax itself is valid.* It must be understood that under the Oklahoma system of taxation a lien is fixed on all the property, both real and personal, for the collection of *personal property taxes.* Section 1, chapter 181 of the S. L. 1915, makes taxes due from any person upon *personal property*, a lien for a period of two years upon real property owned by such person in the county where the taxes are levied.

Section 11, chapter 164, S. L. 1915 (the Income Tax Act) provides that if any of the taxes herein levied become delinquent they shall become

a lien upon all the property, personal and real, of such delinquent person, and shall be subject to the same penalties and provisions *as are the ad valorem taxes.* This announces the taxing system of the state which fixes a lien upon all properties and resources within the state subject to taxation, whether to secure payment of special or *ad valorem* taxes. The income tax, while not a tax upon the property producing it, is so closely related thereto, and sufficiently connected therewith, to give the state jurisdiction to assess it and enforce collection of the tax thereon by attaching a lien to the property producing the income or other property. There can be no possible distinction when the lien is considered in the light of collecting a tax where the tax itself is valid.

Income Tax Law Not Repealed Nor Affected by Gross Production Tax Act of 1916.

Appellant contends that the Gross Production Tax Act of 1916, being chapter 39, S. L. 1916, supersedes the Income Tax Law. The title of the act will throw some light on the intention of the Legislature as to property covered by the tax and the extent thereof. It is entitled:

> "An Act relating to the taxation of the gross production of asphalt, ores, bearing lead, zinc, jack, gold, silver and copper, and of petroleum, or other crude oil or mineral

> oil and of natural gas in lieu of any other method of taxing *same* and of certain property used in the production thereof. * * *"

It is plain to be seen from the above title that in the expression, "in lieu of any other method of taxing same," the word "*same*" refers to the ores named, or oil produced and the property used in the production thereof as physical property. In other words, the tax is intended to take the place of the general *ad valorem tax.* It goes to this extent and no more.

We next read from the third paragraph of sec tion 1 of the act, page 104:

> "The payment of the taxes herein imposed shall be in full and in lieu of all taxes by the state, counties, cities, towns, townships, school districts and other municipalities *upon any property rights* attached to or inherent in the right to said minerals, upon leases for the mining of asphalt and ores bearing lead, zinc, jack, gold, silver or copper or for petroleum or other crude oil or other mineral oil or for natural gas upon the mining rights and privileges for the minerals aforesaid belonging or appertaining to land *upon the machinery, appliances and equipment* used in and around any well producing petroleum or other crude oil or mineral oil or natural gas, or any mine producing asphalt, or any of the mineral ores aforesaid and actually used in the operation of such well or mine; and also upon the oil gas, asphalt or ores bearing minerals hereinbefore mentioned during the tax year in

which the same is produced, and upon any investment in any of the leases, rights, privileges, minerals or property hereinbefore in this paragraph mentioned or described; but any interest in the land other than that herein enumerated, and oil in storage, asphalt, and ores bearing the minerals hereinbefore named, mined, produced and on hand at the date as of which property is assessed for general and *ad valorem* taxation for any *subsequent* tax year shall be assessed and taxed as other property within the taxing district in which such property is situated at the time."

An analysis of the above section will demonstrate clearly the intent of the Legislature. In the first place, it is said the payment of the taxes herein imposed shall be in full and in lieu of all taxes by the *state, counties, cities, towns, townships, school districts and other municipalities* upon any property rights attached to or inherent in the right to said minerals. In view of the fact that it was impossible to tax each gallon or barrel of oil produced, physically speaking, it was necessary that some method be adopted whereby the quantity of oil could be ascertained upon which to base an *ad valorem* or property tax. The Legislature simply said that the whole volume of oil produced in a year shall constitute the *corpus* of the taxable entity thereon, and that such tax shall be in lieu of any and all other forms of *ad valorem* or property tax upon the oil or the appliances used in its production for the current tax year.

To further illustrate the meaning, the section further provides that if this oil is retained in storage until the beginning of the ensuing tax year, it shall be taxed along with other property for general *ad valorem* taxes.

The second paragraph of the act under consideration, at page 105 of said Session Laws 1916, provides as follows:

> "The State Board of Equalization, upon its own initiative, may, and upon complaint of any person who claims that he is taxed too great a rate hereunder shall take testimony to determine whether the taxes herein imposed are greater, or less, than the general *ad valorem* tax for all purposes would be on the property of such producer subject to taxation in the district or districts where the same is situated, including the value of oil, gas, or mineral lease, or of the mining or mineral rights, the machinery, equipment or appliances used in the actual operation of, in and around any such well or mine, the value of the oil, gas, asphalt or any of the said mineral ores produced, and any other element of taxable value in lieu of which the tax herein is levied. The said board shall have power and it shall be its duty to raise or lower the rates herein imposed to conform thereto."

The above unmistakably and indisputably shows that the Gross Production Tax on oil is an *ad valorem* or property tax, and that the year's production is merely adopted as the measuring stick

by which to determine the amount thereof.

An illustration of the same principle is found in a provision of the Oklahoma General Tax Law taxing stocks of merchandise. The tax is not assessed against any particular invoice of goods in the store at any one time, but is laid upon the average amount of merchandise carried for the year at the ordinary *ad valorem* rate of taxation. That tax is a tax upon the quantity of goods carried by the merchant, the same as the tax on the year's production of oil is a tax upon the quantity of oil produced by the operator. A mere standard of measure in order to ascertain the amount of value upon which to assess the tax. See *Large Oil Co.* v. *Howard*, — Okla. —, 163 Pac. 537.

CONCLUSION.

For the reason that the assessment is valid, we respectfully request that the opinion rendered below be affirmed.

Respectfully submitted,

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Attorney General of the State of Oklahoma;

C. W. King,
Assistant Attorney General;
Attorneys for Appellees.

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No. 375.

In the

Supreme Court of the United States.

October Term, 1918.

CHARLES B. SHAFFER, - - - - - - - *Appellant,*

VERSUS

E. B. HOWARD, Auditor of the State of Oklahoma, and JOHN S. WOOFTER, Sheriff of Creek County, State of Oklahoma, - - - - *Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF OKLAHOMA.

Reply to Answer Brief of Appellees.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

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E. B. HOWARD, Auditor of the State of Oklahoma, and JOHN S. WOOFTER, Sheriff of Creek County, State of Oklahoma, - - - - *Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF OKLAHOMA.

REPLY TO ANSWER BRIEF OF APPELLEES.

Probably we should apologize to the court for filing this reply brief; but counsel for neither of the parties had fully developed their views at the time the case was heard below, and we feel that it is necessary to reply to some of the contentions of the Attorney General. We will devote a portion of this brief to the question of adequate remedy at law, and then make a few additional suggestions as to the merits.

The Appellant Has No Plain, Adequate and Complete Remedy at Law.

The Attorney General urges that appellant has an adequate remedy at law.

He contends that this remedy is found in Section 9 of Chapter 164 of the Session Laws of Oklahoma of 1915, quoted at page three of his brief; in Section 2 of Chapter 107 of the Session Laws of Oklahoma of 1915, quoted at page four of this brief; and in Section 7 of the same chapter, quoted at page five of his brief, and at page one hundred twenty-five of our original brief. Section 9 of Chapter 164 gives the party complaining the right to appear before the auditor for the purpose of having his income tax assessment revised, but no appeal is given from his action. Section 2 of Chapter 107 does not apply at all. There can be no plausible contention that any remedy is given except as to Section 7 of Chapter 107 of the ad valorem tax law of 1915. That section is quoted in both of the briefs heretofore filed, but for convenience we quote it again:

> "In all cases where the illegality of the tax is alleged to arise by reason of some action from which the laws provide no appeal, the aggrieved person shall pay the full amount of the taxes at the time and in the manner provided by law, and shall give notice to the officer collecting the taxes showing the grounds of complaint and that

> suit will be brought against the officer for recovery of them. It shall be the duty of the collecting officer to hold such taxes separate and apart from all other taxes collected by him, for a period of thirty days and if within such time summons shall be served upon such officer in a suit for recovery of such taxes, the officer shall further hold such taxes until the final determination of such suit. All such suits shall be brought in the court having jurisdiction thereof, and they shall have precedence therein; if, upon final determination of any such suit, the court shall determine that the taxes were illegally collected, as not being due the state, county or subdivision of the county, the court shall render judgment showing the correct and legal amount of taxes due by such person, and shall issue such order in accordance with the court's findings, and if such order shows that the taxes so paid are in excess of the legal and correct amount due, the collecting officer shall pay to such person the excess and shall take his receipt therefor."

This section is not specifically referred to in the income tax statute. Section 11 of that statute provides that if any of the income tax becomes delinquent it shall become a lien on the property, personal and real, of the delinquent person, "and shall be subject to the same penalties and provisions as are all ad valorem taxes." We do not see how it can be claimed that this reference includes Section 7 of the ad valorem tax law. In this connection we

refer the court to *Weston* v. *Luce County,* 61 N. W. 15. In that case the first paragraph of the syllabus is as follows:

> "Laws 1893, Act 206, Sec. 53, besides providing for the recovery of illegal taxes paid to the township treasurer under protest (provided the township is sued therefor in 30 days), provides for the payment to such treasurer by one cotenant of his share of the taxes, and also by a person having a lien on the land. Section 58 provides that, after the return of the land for unpaid taxes, the 'county treasurer' may receive, 'under like provisions as in section 53,' the amounts of the taxes. *Held*, that the latter section does not authorize the recovery of taxes paid to the 'county treasurer' under protest."

Section 11 of Chapter 164 has no application at all until after the tax is delinquent and has become a lien. It will be noted that Section 11 is preceded by Section 10, which requires the auditor to *issue a warrant* for the collection of the tax, if it is not paid when due and requires the same proceedings on the warrant as upon a tax warrant issued by the county treasurer. Section 11 was intended merely to give the state the same penalties and remedies for the collection of delinquent income taxes after a tax warrant issues, as were given by statute for delinquent ad valorem taxes. These penalties and remedies are found in Article 9 of Chapter 72 of the

Revised Laws of Oklahoma of 1910. They only apply after the taxes become delinquent. If Section 7 of Chapter 107 applies and must be complied with, then, of course, the tax could never become delinquent. That section requires the taxes to be paid in full when due.

The provisions of Section 11 of Chapter 164 cannot be construed to extend to Section 7, because Section 11 of Chapter 164 only applies to delinquent taxes. It is intended to give the state the right to collect penalties against persons who are delinquent in the payment of their taxes. There is no such thing as delinquency in the payment of an illegal tax. In other words, if a tax is not lawfully levied, the person against whom it is attempted to be levied, cannot be considered delinquent.

In *Chauncey* v. *Moss*, 30 N. W. 830, the court said:

> "To constitue a legally delinquent tax on land three things are necessary:
>
> "*1st*, that the land is subject to taxation; *2nd*, that a tax authorized by law has been levied on it in the manner provided by law; *3rd*, that the tax remains unpaid after the time appointed by law for its payment. To make out a tax delinquent, each of these things must be shown—each is as essential as either of the others."

The case of *Dodge* v. *Osborn*, 240 U. S. 188, 60 L. ed. 557, quoted and relied on by the Attorney General, is construing an entirely different statute. The provision of the Federal Income Tax Law construed in that case provides that:

> "All administrative, special and general provisions of law, including the laws in relation to the assessment, remission, collection, and refund of internal revenue taxes not heretofore specifically repealed, and not inconsistent with the provisions of this section, are hereby extended and made applicable to all the provisions of this section and to the tax herein imposed."

This provision of the Federal Income Tax Law is broad, sweeping and unequivocal. Section 11 of Chapter 164 is narrow and leaves a wide margin for construction. Section 11 of the Oklahoma Income Tax Law certainly has no application until after the tax has become delinquent, and it certainly can as reasonably be construed to apply only to the procedure for the collection after the tax warrant is issued as to include the provisions of Section 7 of Chapter 107.

The question as to whether a remedy is given by the provisions of Section 7 of Chapter 107, is as doubtful to say the least, as the question of whether the revenue laws of Colorado before this court in *Union Pacific R. Co.* v. *Weld County*, 247 U. S. 282,

gave such legal remedy as to oust equity jurisdiction.

In that case this court held that it was doubtful whether the Colorado statute gave a complete and adequate remedy and, therefore, that equity had jurisdiction. This court quoted from *Davis* v. *Wakelee*, 156 U. S. 680, as follows:

> "It is a settled principle of equity jurisprudence that if the remedy at law be doubtful a court of equity will not decline cognizance of the suit * * * Where equity can give relief, plaintiff ought not to be compelled to speculate on the chances of his obtaining relief at law."

This court will be satisfied that the question here is more than doubtful by an examination of the income tax statute which is printed in full as an appendix to our original brief. The court will be still further convinced by an examination of Chapter 107 of Session Laws of 1917, page 142. It is perfectly clear that the income tax statute does not give all the remedies provided by the Oklahoma ad valorem tax law because the Attorney General admits that under the income tax statute there was no appeal from the decision of the auditor.

The Attorney General misinterprets the argument in our original brief, based upon Section 57 of Article 5 of the Constitution of Oklahoma, which provides that:

> "Every act of the legislature shall embrace but one subject, which shall be clearly expressed in its title * * * and no law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only, but so much thereof as is revived, amended, extended, or conferred shall be re-enacted and published at length," etc.

He says that we made the argument that an attempt to amend and extend the provisions of the ad valorem tax act by reference contained in the income tax would be unconstitutional because of the provisions of Section 57 of Article 5. We did not make that argument because we are satisfied this court has enough to do without unnecessarily devoting time to the construction of the Oklahoma constitution. While Section 57 of Article 5 seems to be plain, and giving it anything like the meaning attached to the ordinary use of the words therein, an attempt to extend the provisions of a statute by a mere reference would be unconstitutional, still our argument was (page 130 of our original brief) that because of the said constitutional provision it should not be presumed that the legislature intended to extend the provisions of Chapter 107 to income taxes.

The Attorney General refers to *Pond Creek* v. *Haskell*, 21 Okla. 711, 97 Pac. 338, as authority for the proposition that Section 57 of Article 5 of the Oklahoma Constitution does not prevent the exten-

sion of the provisions of Section 7 of Chapter 107, by a mere reference. This court will not pass upon the question of the validity as affected by the Oklahoma Constitution. It is not necessary for this court to do so. But if the court will read the case of *Pottawatomie County* v. *Alexander*, 172 Pac. 436, we believe it will conclude that the validity of an extension of the act by a mere reference would be very doubtful to say the least. But here there is no reference at all.

We allege in our petition that the bond of the State Auditor is only Five Thousand ($5,000.00) Dollars and that he personally is financially unable to satisfy a judgment in the amount of the tax attempted to be collected from the appellant in this case, that the State Auditor contended that the provisions of Section 7 of Chapter 107 of the Laws of 1915 had no application and stated that he would pay the money into the state treasury if it was paid to him. It is true that there is a general denial of all the allegations of the bill, but on the application for a temporary injunction we do not believe that a mere general denial of an allegation of this sort should be sufficient to prevent us from having the temporary injunction. The Attorney General attempts to avoid the effect of this allegation by reference to Chapter 238 of the Session Laws of 1915, which is an act creating a state depository. Section 7 of Chapter

107 requires the collecting officer "to hold such taxes separate and apart from other taxes collected by him for a period of thirty days, and if within such time, summons shall be served upon any such officer in a suit for recovery of such taxes, the officer shall further hold such taxes until the final determination of said suit." It further provides that if the court finds that more taxes have been collected than are due, "the collecting officer shall pay to such person the excess and take his receipt therefor." There is no reference whatever in that law to paying the money into any state depository and there is no reference in the Oklahoma Income Tax Law referring to Chapter 238 of the Session Laws of 1915, or to Section 7 of Chapter 107.

Section 7 of Chapter 238 is as follows:

> "All moneys that shall be received during any calendar month by any state officer, state board, state commission or the members or employees of either thereof, accruing as a part of state's general revenue or any other appropriated funds, shall be paid into the state treasury —that is, transferred from the official depository to the fund or funds in the state treasury to which the same belongs by the authority so receiving the same on or before the second Monday following the close of the calendar month in which such moneys shall have been received, and it shall be the further duty of all such officers, board, commissions and the members and em-

ployees of either thereof, to make and file with the State Auditor, on or before the second Monday of each month, a verified report in writing showing the several sources, classes and amounts of money received by virtue or under color of office during the preceding calendar month, together with an itemized statement of the amount and purpose of each of the several vouchers issued in disbursement, distribution and transfer thereof."

Clearly the provisions of this section are inconsistent with the provisions of Section 7 of Chapter 107 and do not refer to it in the remotest way. The question as to whether the appellant, and persons similarly situated, have a remedy at law under the provisions of Section 7 of Chapter 107 has never been decided by the Supreme Court of Oklahoma. We think the principle involved here is exactly the same as the one before the court in *Union Pacific R. Co.* v. *Weld County*, 247 U. S. 282, and we believe that our case is stronger by reason of the allegations contained in the petition that the auditor takes the position that the provisions of Section 7 of Chapter 107 do not apply to income taxes. The case of *City Council of Augusta* v. *Timmerman*, 233 Fed. 216, referred to by the Attorney General is not in point on the question of remedy, because the statute there relied upon was not a mere vague and uncertain reference that might or might not include the remedy

being sought, but the case only arose from the construction of the statute itself, which purported to give the remedy in that case. It was further held that the party seeking to enjoin the taxes had no case on the merits; so, after all, what was said about the remedy was not necessary.

Singer Sewing Machine Company v. *Benedict*, 229 U. S. 481, 57 L. ed. 1289, construed the Colorado statute and held that there was a remedy at law, but the statute before the court in that case had been construed by the Colorado Supreme Court and held by that court to confer a remedy at law. The statute under consideration here has not been construed by the Oklahoma Supreme Court. In *Union Pacific R. Co.* v. *Weld County*, 247 U. S. 282, this court referred to the fact that the Colorado Supreme Court had not construed the statutes under consideration there, as bearing on the uncertainty of remedy. In *Singer Sewing Machine Co.* v. *Benedict, supra,* as well as in *Shelton* v. *Platt*, 139 U. S. 591, the statutes held to give a remedy at law, gave a right of action against the body politic collecting the taxes and not merely against the officer. The statute under construction in *Shelton* v. *Platt* provided that if the taxes are held illegal the comptroller "shall issue his warrant for the same, which shall be in preference to other claims on the treasury." There is no such provision in the Oklahoma statute. There is

no liability imposed upon the state, but the party paying the illegal tax is required to look simply to the officer who collects the same. We contend now, as we contended in our original brief, that even if Section 7 of Chapter 107 could be construed to apply to the tax in question, it would not give an adequate remedy. In other words, we contend that the state in order to give an adequate remedy must hold itself liable as a state for the refund of the taxes.

The Merits.

We were not mistaken as to the attitude of the Attorney General as to the nature of the tax in question. In his brief on file in this case he says (p. 23):

> "As we understand the above grant of taxing power, insofar as the income tax is concerned, income as distinguished from every other species of ownership, right or property was designated as a proper subject for taxation. This income constitutes within itself a taxable entity, regardless of the source from which it springs, and has no relation to any particular property or business, except such incomes must, for jurisdictional purposes, have been derived from a business, trade, profession or property located within the taxing state. This does not, however, connect the taxable income with any particular property, even though the entire income might have been derived from one particular class of property. The income which the state assumes

> to tax has been set apart as a taxable asset growing out of the exploitation of the resources of the state, or from the exercise of a business, trade or profession therein. This income is to be considered as separate and apart from its source, whether derived from one business or property or more, or from the mixed ownership of various properties, in conjunction with the conduct of numerous business enterprises."

At page 26 he says:

> "It will be considered by the court that the income tax (as now regarded) is a new and growing form of taxation, having its origin in the growth of large modern fortunes, and having for its purpose the resting of the burdens of government upon those most able to pay."

If the concurring views of opposing counsel as to the nature of this tax is accepted by this court the only question for the consideration of the court is the one of situs. We contend that the income is with the recipient to whom it comes in. The Attorney General contends that its situs is at the place where the property or business producing the income is situated. It has not been contended and cannot be successfully contended that the State of Oklahoma can tax money actually in the State of Illinois, belonging to a citizen of the State of Illinois, because the money was derived from some investment or business in the State of Oklahoma. Oklahoma could

not fix the situs of such money in the state by any legislative enactment, even though it was derived from the resources of the state. It is not in the power of the State of Oklahoma to tax property belonging to a non-resident and not in the state, although it may have been produced from the resources of the state and may have been in the state at one time. When personal property belonging to a non-resident of Oklahoma leaves Oklahoma, it is no longer taxable there, although it may have been the product of the resources of the state. See *Hawley* v. *Malden*, 232 U. S. 1-11; and Cooley on Taxation, 3rd ed., p. 84, and following. No case cited by counsel for appellees is opposed to this doctrine. *Adams Express Co.* v. *Auditor*, 166 U. S. 185, 41 L. ed. 965, so much relied upon by appellees is entirely consistent with our view. That case merely held that the intangible franchises, contracts, and privileges which entered into and made up the value of the entire property of the corporation should be considered as distributed throughout the states in which the corporation was engaged in business and that each state could tax not only the tangible property actually situated within the state but also the intangible property of the corporation in proportion to the business done in the state. That is an essentially different case from the one before the court. In this case the income is separated from the business. It does not

enter into it. It is not a franchise, contract or privilege. It does not in any way enhance the value of appellant's property in Oklahoma. It has reached appellant's hands and he, as the recipient of the income, is free to use it as he chooses. In *State* v. *Wisconsin Tax Comm.*, 161 Wis. 111, 152 N. W. 848, the Supreme Court expressly refused to decide whether an income could have a situs different from the domicile of the recipient. If this court accepts the views of counsel for the respective parties as to what the taxable income is, we do not see how it is possible to hold that the situs of appellant's income is in Oklahoma.

As we anticipated in our original brief, it is urged that because the general government levies tax upon incomes of non-residents from property and business within the United States, the states have the same rights as to the incomes of non-residents. We pointed out the difference in the power of a state and the nation in that regard. The tax levied by the national government on such incomes is an excise tax and is collected at the source. (See *Michigan Central R. Co.* v. *Slack*, 10 Otto. 595, 25 L. ed. 647.) We said in our original brief (p. 81) that the State of Oklahoma could not collect the tax here sought to be collected, at its source, and that to withhold the tax at its source would be a burden on interstate commerce. Under the facts of this case, the money

constituting the income is never here, and the only way the state could collect at the source would be by holding the oil which was sold to produce the income, and to hold the oil would certainly be a burden on interstate commerce. In this connection the Attorney General again misapprehends one of our statements. He says (p. 79, appellees' brief) that we are of the opinion that to sustain the tax would be a calamity. We did not make this statement. We believe that the ultimate effect of a decision sustaining the tax would be mischievous, but we did not say so in our original brief.

What we did say was that it would be a real calamity for the courts to decide that a state may *withhold at the source* the tax on the income of a natural person, a citizen of another state, derived from business or property in the taxing state. If the states have such power some of them will exercise it, with the result that every business transaction will be interfered with and what few rights which remain to the citizen to manage his business in his own way, without subjecting it to the continual scrutiny of persons clothed with a little brief authority, will be taken away and many, if not all, the evils will again arise which were sought to be abolished when the Constitution of the United States gave to Congress the power to regulate commerce among

the several states and prohibited the states from laying imposts or duties on imports or exports.

The tax before the court in this case is not an excise tax. The Attorney General does not claim that it is. But if the state had attempted to assess an excise tax it would have been void as an attempt to lay a burden on interstate commerce. The court has lately gone over this question in *International Paper Co.* v. *Massachusetts,* 246 U. S. 135, and *Looney* v. *Crane Company,* 245 U. S. 178. These cases are important upon most of the questions involved here and even on the facts there are many points of resemblance.

Besides, as urged in our original brief, the gross production tax is an excise tax and the payment of that tax relieves appellant from the payment of all excise and privilege taxes. The Attorney General takes the position that the gross production tax is an *ad valorem* tax and he refers to *Large Oil Co.* v. *Howard,* 163 Pac. 537, as supporting his position. The Supreme Court of Oklahoma did say in one part of the opinion in that case that the tax was a property tax, though the same sentence containing this statement also says that it possesses some of the characteristics of an occupation tax; but in another portion of the opinion (p. 340) the court uses language which seems to mean that the gross produc-

tion tax is a commutation tax in lieu of all other taxes. The court uses this language:

> "The imposition of taxes is brought about in different ways by the state governments, and in this state may be brought about by different means or methods. Section 22, Art. 10, Constitution. If the legislature deems it wise to *compound for all other taxes* on a particular kind of business, difficult of taxation under the methods commonly pursued, by receiving a fixed part of the value of the gross production thereof, as a substitute for *all taxes,* it must be assumed by the courts that it was the legislative determination that the sum fixed was a proper equivalent for the taxes obtainable in a different mode and that it was a proper exercise of legislative power. This results, necessarily, from the legislative control over the subject of taxation, restrained only by constitutional requirements, obligatory alike on the legislature and the courts. And where the particular plan of taxation, provided for by the legislative wisdom, may be accounted for on the assumption of compounding or commuting for a just equivalent, or as a proper substitute, according to the determination of the Legislature, in the general scheme of taxation, it will not be condemned by the courts as violative of the Constitution." (Italics ours.)

We think *Large Oil Co.* v. *Howard* supports our contention as to what the gross production tax is.

In view of the case of *Howard* v. *Gypsy Oil Co.,* 247 U. S. 503, and companion cases, we do not know

how this Court will regard the decision of the Oklahoma Supreme Court in *Large Oil Co.* v. *Howard.*

At the time the original brief was printed, the opinions of the Judges below in this case had not been published. They have since been published in 250 Fed. 873, Advance Sheet of September 26, 1918.

We respectfully urge that this case be reversed.

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